Supreme Court, U.S.
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No. 10-

IN THE

Supreme Court of the United States

CONSOLIDATION COAL COMPANY ET AL.,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is an otherwise unconstitutional tax imposed upon the sale of goods in the stream of export commerce saved from invalidation under the Export Clause by recharacterizing it as a deferred tax on manufacturing?

PARTIES TO THE PROCEEDINGS BELOW

Petitioners are Consolidation Coal Company, Consol of Pennsylvania Coal Company, Consol of Kentucky Inc., Eighty Four Mining Company, Helvetia Coal Company, Island Creek Coal Company, Kent Coal Mining Company, Keystone Coal Mining Corporation, Laurel Run Mining Company, McElroy Coal Company, Ninevah Coal Company, Quarto Mining Company, Eagle Energy, Inc., Elk Run Coal Company, Inc., Goals Coal Company, Green Valley Coal Company, Independence Coal Company, Inc., Knox Creek Coal Corporation, Marfork Coal Company, Inc., Martin County Coal Corporation, Peerless Eagle Coal Company, Performance Coal Company, Rawl Sales & Processing, Sidney Coal Company, Inc., Stone Mining Company, Jim Walter Resources, Inc., Eastern Associated Coal Corporation, Kingston Resources, Inc., Pioneer Fuel Corporation, Powder River Coal Company, Apogee Coal Company, Arch Western Resources, LLC, Canyon Fuel Company, LLC, Catenary Coal Company, Coal-Mac, Inc., Dal-Tex Coal Corporation, Hobet Mining, Inc., Mingo Logan Coal Co., Paynter Branch Mining, Inc., Plateau Mining Corporation, RAG Cumberland Resources, L.P., RAG Emerald Resources, L.P., Twentymile Coal Company, Coastal Coal Company, LLC, Coastal Coal-West Virginia, LLC, Evergreen Mining Company, Mid-Vol Leasing, Inc., Mountaineer Coal Development Company, Old Ben Coal Company, Shipyard River Coal Terminal Company, Riverside Energy, Inc., Virginia Crews Coal Company, Clintwood Elkhorn Mining Company, Gatliff Coal Company, Premier Elkhorn Coal Company, Perry County Coal Corporation,

Glamorgan Coal Company, LLC, Terry Eagle, L.P., Nicholas-Clay Land & Mineral, Inc., Nicholas-Clay Company, LLC, Andalex Resources, Inc., Genwal Resources, Inc., Pacific Coast Coal Company, Usibelli Coal Mine, Inc., West Ridge Resources, Inc., United States Steel Mining Company, LLC, and Covenant Coal Corporation, and Wellmore Energy Company, LLC (formerly known as Rapoca Energy Company, LLC), and were the plaintiffs-appellants below.

The United States is respondent and was the defendant-appellee below.

RULE 29.6 STATEMENT

All parent corporations and any publicly held companies that own 10 percent or more of the stock of petitioners are (*italics* indicate publicly held):

Named Party	**Parent Corporations and any Publicly Held Company that Owns 10 Percent or More of the Named Party**
Consolidation Coal Company	*Consol Energy Inc.*
Consol of Pennsylvania Coal Company (n/k/a CONSOL Pennsylvania Coal Company LLC)	*Consol Energy Inc.*
Consol of Kentucky Inc.	*Consol Energy Inc.*
Eighty Four Mining Company	CONSOL Financial Inc. *Consol Energy Inc.*
Helvetia Coal Company	Rochester & Pittsburgh Coal Company Consolidation Coal Company *Consol Energy Inc.*
Island Creek Coal Company	Consolidation Coal Company *Consol Energy Inc.*

Kent Coal Mining Company	(merged in 2001 into co-plaintiff Keystone Coal Mining Corporation) Rochester & Pittsburgh Coal Company Consolidation Coal Company *Consol Energy Inc.*
Keystone Coal Mining Corporation	Rochester & Pittsburgh Coal Company Consolidation Coal Company *Consol Energy Inc.*
Laurel Run Mining Company	Island Creek Coal Company Consolidation Coal Company *Consol Energy Inc.*
McElroy Coal Company	Consolidation Coal Company *Consol Energy Inc.*
Nineveh Coal Company	(merged in 2002 into co-plaintiff Consol of Pennsylvania Coal Company n/k/a CONSOL Pennsylvania Coal Company LLC) *Consol Energy Inc.*

Quarto Mining Company	(merged in 2005 into co-plaintiff Consolidation Coal Company) *Consol Energy Inc.*
Eagle Energy, Inc.	Long Fork Coal Company A.T. Massey Coal Company, Inc. *Massey Energy Company*
Elk Run Coal Company, Inc.	A.T. Massey Coal Company, Inc. *Massey Energy Company*
Goals Coal Company	Performance Coal Company Elk Run Coal Co., Inc. A.T. Massey Coal Company, Inc. *Massey Energy Company*
Green Valley Coal Company	Elk Run Coal Co., Inc. A.T. Massey Coal Company, Inc. *Massey Energy Company*
Independence Coal Company, Inc.	Elk Run Coal Company, Inc. A.T. Massey Coal Company, Inc. *Massey Energy Company*

Knox Creek Coal Corporation	Martin County Coal Corporation A.T. Massey Coal Company, Inc. *Massey Energy Company*
Marfork Coal Company, Inc.	Elk Run Coal Company, Inc. A.T. Massey Coal Company, Inc. *Massey Energy Company*
Martin County Coal Corporation	A.T. Massey Coal Company, Inc. *Massey Energy Company*
Peerless Eagle Coal Company	Elk Run Coal Co., Inc. A.T. Massey Coal Company, Inc. *Massey Energy Company*
Rawl Sales & Processing Company	Elk Run Coal Co., Inc. A.T. Massey Coal Company, Inc. *Massey Energy Company*
Sidney Coal Company, Inc.	A.T. Massey Coal Company, Inc. *Massey Energy Company*
Stone Mining Company	Long Fork Coal Company A.T. Massey Coal Company, Inc. *Massey Energy Company*

Apogee Coal Company n/k/a Apogee Coal Company, LLC	New Trout Coal Holdings II, LLC Magnum Coal Company *Patriot Coal Corporation*
Arch Western Resources, LLC	Arch Western Acquisition Corporation *Arch Coal, Inc. owns 99% of Arch Western* Delta Housing, Inc. (1% partner) BP America, Inc. (1% partner thru Delta Housing) *BP PLC*
Canyon Fuel Company, LLC	Arch Western Resources, LLC owns 65% of Canyon Fuel Arch Western Acquisition Corporation *Arch Coal, Inc. owns 35% of Canyon Fuel* Delta Housing, Inc. (1% partner) BP America, Inc. (less than 1% partner thru Delta Housing) of Arch Western's 65% ownership *BP PLC*

Catenary Coal Company n/k/a Catenary Coal Company, LLC	Viper LLC New Trout Coal Holdings II, LLC Magnum Coal Company *Patriot Coal Corporation*
Coal-Mac, Inc.	*Arch Coal, Inc.*
Dal-Tex Coal Corporation	(merged in 1996 into co-plaintiff Hobet Mining, Inc.)
Hobet Mining, Inc. n/k/a Hobet Mining, LLC	New Trout Coal Holdings II, LLC Magnum Coal Company *Patriot Coal Corporation*
Mingo Logan Coal Co.	*Arch Coal, Inc.*
Kingston Resources, Inc.	Riverton Coal Production Inc. Alpha American Coal Holding, LLC *Alpha Natural Resources, Inc.*
Paynter Branch Mining, Inc.	Riverton Coal Production Inc. Alpha American Coal Holding, LLC *Alpha Natural Resources, Inc.*

Pioneer Fuel Corporation	Pioneer Mining, Inc. Riverton Coal Production Inc. Alpha American Coal Holding, LLC *Alpha Natural Resources, Inc.*
Plateau Mining Corporation	Alpha American Coal Company, LLC Alpha American Coal Holding, LLC *Alpha Natural Resources, Inc.*
RAG Cumberland Resources, LP n/k/a Cumberland Coal Resources, LP	Foundation PA Coal Company, LLC Pennsylvania Service Corporation Alpha American Coal Company, LLC Alpha American Coal Holding, LLC *Alpha Natural Resources, Inc.*

RAG Emerald Resources, LP n/k/a Emerald Coal Resources, LP	Foundation PA Coal Company, LLC Pennsylvania Service Corporation Alpha American Coal Company, LLC Alpha American Coal Holding, LLC *Alpha Natural Resources, Inc.*
Twentymile Coal Company n/k/a Twentymile Coal, LLC	*Peabody Colorado Operations, LLC* *Peabody Operations Holding, LLC Peabody Investments Corp.* *Peabody Energy Corporation*
Coastal Coal Company, LLC n/k/a Enterprise Mining Company, LLC	AMFIRE, LLC Maxxum Carbon Resources, LLC Alpha Natural Resources, LLC *Alpha Natural Resources, Inc.*

Coastal Coal-West Virginia, LLC n/k/a Brooks Run Mining Company, LLC	AMFIRE, LLC Maxxum Carbon Resources, LLC Alpha Natural Resources, LLC *Alpha Natural Resources, Inc.*
Eastern Associated Coal Corporation n/k/a Eastern Associated Coal, LLC	Coal Properties, LLC Heritage Coal Company LLC Interior Holdings, LLC Eastern Coal Company, LLC *Patriot Coal Corporation*
Evergreen Mining Company	Newcoal, LLC *International Coal Group, Inc.*
Mid-Vol Leasing, Inc. n/k/a Mid-Vol Coal Sales Inc.	Mid-Vol Coal Sales Inc. *ArcelorMittal*
Mountaineer Coal Development Company	Newcoal, LLC *International Coal Group, Inc.*
Old Ben Coal Company	Newcoal, LLC *International Coal Group, Inc.*
Shipyard River Coal Terminal Company	Newcoal, LLC *International Coal Group, Inc.*

Riverside Energy, Inc. (merged into AMCI Holdings, Inc. in 2005)	AMCI Holdings, Inc.
Virginia Crews Coal Company	AMCI Holdings, Inc.
Clintwood Elkhorn Mining Company	TECO Coal Corporation TECO Diversified, Inc. *TECO Energy, Inc.*
Gatliff Coal Company	TECO Coal Corporation TECO Diversified, Inc. *TECO Energy, Inc.*
Premier Elkhorn Coal Company	TECO Coal Corporation TECO Diversified, Inc. *TECO Energy, Inc.*
Perry County Coal Corporation	TECO Coal Corporation TECO Diversified, Inc. *TECO Energy, Inc.*
Glamorgan Coal Company, LLC	AMVEST Minerals Company, LLC AMVEST Corporation *Consol Energy Inc.*

Terry Eagle L.P.	TECPART Corporation TEAGLE Company, LLC AMVEST Coal & Rail, LLC AMVEST Minerals Company, LLC AMVEST Corporation *Consol Energy Inc.*
Nicholas-Clay Land & Mineral, Inc.	AMVEST Coal & Rail, LLC AMVEST Minerals Company, LLC AMVEST Corporation *Consol Energy Inc.*
Nicholas-Clay Company, LLC n/k/a AMVEST West Virginia Coal, LLC	Nicholas-Clay Land & Mineral, Inc. Terry Eagle L.P. TECPART Corporation TEAGLE Company, LLC AMVEST Coal & Rail, LLC AMVEST Minerals Company, LLC AMVEST Corporation *Consol Energy Inc.*
Andalex Resources, Inc.	UtahAmerican Energy, Inc.

Genwal Resources, Inc.	Andalex Resources, Inc. UtahAmerican Energy, Inc.
Jim Walter Resources, Inc.	*Walter Energy, Inc.*
Pacific Coast Coal Company	Pacific Coast Coal Co., Inc.
Usibelli Coal Mine, Inc.	N/A
Powder River Coal Company n/k/a Powder River Coal, LLC	*Peabody Powder River Operations, LLC* *Peabody Operations Holding, LLC Peabody Investments Corp.* *Peabody Energy Corporation*
Covenant Coal Corporation	N/A
United States Steel Mining Company LLC	*United States Steel Corporation*
West Ridge Resources, Inc.	Andalex Resources, Inc. UtahAmerican Energy, Inc.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS BELOW ii

RULE 29.6 STATEMENT iv

TABLE OF AUTHORITIES xviii

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS 1

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 12

I. The Ruling Below Conflicts With This Court's Established Export Clause Jurisprudence In Upholding The Reclamation Fee As Applied By The Government To The Sale Of Exported Coal 14

A. The Export Clause Prohibits A Tax On The Sale Of A Good For Export. 14

B. The Government Has Administered The Reclamation Fee As A Tax On The Sale Of Coal In Export Commerce. 15

C. An Unconstitutional Tax On Sales For Export Is Not Saved By Recharacterizing That Tax As A "Deferred" Manufacturing Tax. 18

D. The Canon Of Constitutional Avoidance Does Not Authorize A Court To Displace An Agency's Interpretation Of The Statute Or To Ignore The Way In Which A Statute Has Actually Been Applied 22

II. The Federal Circuit's Decision Has Nationwide Implications And Warrants This Court's Review 27

CONCLUSION 30

TABLE OF AUTHORITIES

Cases

A.G. Spalding & Bros. v. Edwards,
262 U.S. 66 (1923) ..... passim
Bowen v. Georgetown Univ. Hosp.,
488 U.S. 204 (1988) 24
Consolidation Coal Co. v. United States,
351 F.3d 1374 (Fed. Cir. 2003) 7
Consolidation Coal Co. v. United States,
54 Fed. Cl. 15 (2002) 6, 7
Drummond Coal Co. v. Hodel,
796 F.2d 503 (D.C. Cir. 1986) ..... passim
Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council,
485 U.S. 568 (1988) 25
Fairbank v. United States,
181 U.S. 283 (1901) 21
Garcia-Villeda v. Mukasey,
531 F.3d 141 (2d Cir. 2008) 22, 23, 24
Hernandez-Carrera v. Carlson,
547 F.3d 1237 (10th Cir. 2008) 22
Kwong Hai Chew v. Colding,
344 U.S. 590 (1953) 25
Liggett & Myers Tobacco Co. v. United States,
299 U.S. 383 (1937) 11, 19, 20, 21
Morales-Izquierdo v. Gonzales,
486 F.3d 484 (9th Cir. 2007) (en banc) 23, 24, 29

National Cable & Telecommunications Association v. Brand X Internet Services, 545 U.S. 967 (2005) 23, 24

United States v. Clintwood Elkhorn Mining Co., 553 U.S. 1 (2008) 29

United States v. Consolidated Coal Co., No. 82-1077, slip op. (S.D.W. Va. Nov. 7, 1985) 8

United States v. Consolidation Coal Co., No. 86-1001, 1987 WL 36307 (4th Cir. Jan. 30, 1987) 17, 27, 28

United States v. Hvoslef, 237 U.S. 1 (1915) 19, 28

United States v. IBM Corp., 517 U.S. 843 (1996) 4, 12, 20, 28

United States v. Spring Ridge Coal Co., 793 F. Supp. 124 (N.D.W. Va. 1992) 17, 27

United States v. Tri-No Enters., Inc., 819 F.2d 154 (7th Cir. 1987) 8, 17, 28

United States v. United States Shoe Corp., 523 U.S. 360 (1998) 14, 19, 20, 28

Statutes

28 U.S.C. § 1295(a)(3) 29

Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. §§ 1201 *et seq.* 2, 4

30 U.S.C. § 1232(a) ..... passim

Constitutional Provisions

U.S. Const. art. I, § 9, cl. 5 ..... passim

Other Authorities

Robert W. Scheef, *Temporal Dynamics in Statutory Interpretation: Courts, Congress, and the Canon of Constitutional Avoidance*, 64 U. PITT. L. REV. 529 (2003) 25

Steven L. Schooner, *The Future: Scrutinizing The Empirical Case For The Court Of Federal Claims*, 71 GEO. WASH. L. REV. 714 (2003) 29

Zachary A. Goldfarb & Perry Bacon Jr., *Obama Brings Industry To Table*, WASH. POST., Jan. 22, 2011, at A1 27

Regulations

30 C.F.R. § 870.12(b) 3, 5, 15

30 C.F.R. § 870.12(b)(1) 5, 16

30 C.F.R. § 870.12(b)(1) (1983) 5

30 C.F.R § 870.12(b)(3) 5

30 C.F.R. § 870.12(b)(3)(i) 6, 16, 16

30 C.F.R. § 870.12(b)(3)(i) (1983) 16

47 Fed. Reg. 28,574 (June 30, 1982) 5, 16

53 Fed. Reg. 19,718 (May 27, 1988) 16

69 Fed. Reg. 56,122 (Sept. 17, 2004) 17

PETITION FOR A WRIT OF CERTIORARI

Petitioners Consolidation Coal Company et al. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-9a) is reported at 615 F.3d 1378. The decision of the United States Court of Federal Claims (Pet. App. 10a-24a) is reported at 86 Fed. Cl. 384. Prior decisions of the court of appeals (Pet. App. 25a-31a) and the Court of Federal Claims (Pet. App. 32a-39a) are reported at 528 F.3d 1344 and 75 Fed. Cl. 537, respectively.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 2010. Pet. App. 2a. The court denied a petition for panel rehearing and rehearing en banc on October 12, 2010. Pet. App. 70a-72a. The Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 9, 2011. App. No. 10A631. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

The Export Clause of the United States Constitution, Art. I, § 9, cl. 5, provides: "No Tax or Duty shall be laid on Articles exported from any State."

The Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. §§ 1201 *et seq*, provides in relevant part:

> All operators of coal mining operations subject to the provisions of this Act shall pay to the Secretary of the Interior, for deposit in the fund, a reclamation fee of 31.5 cents per ton of coal produced by surface coal mining and 13.5 cents per ton of coal produced by underground mining or 10 per centum of the value of the coal at the mine, as determined by the Secretary, whichever is less, except that the reclamation fee for lignite coal shall be at a rate of 2 per centum of the value of the coal at the mine, or 9 cents per ton, whichever is less.

Id. § 1232(a).

The regulations implementing the SMCRA provide in relevant part:

> The fee shall be determined by the weight and value at the time of initial bona fide sale, transfer of ownership, or use by the operator.
>
> (1) The initial bona fide sale, transfer of ownership, or use shall be determined by the first transaction or use of the coal by the operator immediately after it is severed, or removed from a reclaimed coal refuse deposit.
>
> (2) The value of the coal shall be determined F.O.B. mine.
>
> (3) The weight of each ton shall be determined by the actual gross weight of the coal.

> (i) Impurities that have not been removed prior to the time of initial bona fide sale, transfer of ownership, or use by the operator, excluding excess moisture for which a reduction has been taken pursuant to § 870.18, shall not be deducted from the gross weight.
>
> (ii) Operators selling coal on a clean coal basis shall retain records that show run-of-mine tonnage, and the basis for the clean coal transaction.
>
> (iii) Insufficient records shall subject the operator to fees based on raw tonnage data.

30 C.F.R. § 870.12(b).

STATEMENT OF THE CASE

For decades, the Government has imposed a tax upon the sale of domestically produced coal, which is assessed on the date of sale and determined based on the coal's weight and value at the time of sale. Petitioners filed this suit alleging that the tax violates the Constitution's Export Clause when applied to the sale of coal in the export stream, seeking a declaration of the tax's invalidity and a refund of previously paid assessments. U.S. Const. art. I, § 9, cl. 5. The Court of Federal Claims granted petitioners summary judgment. The Federal Circuit reversed, holding that because it would violate the Export Clause to impose a tax on the sale of coal in the stream of export commerce, the doctrine of constitutional avoidance compelled recharacterizing the tax as a deferred tax on the extraction of coal.

1. The Export Clause of the U.S. Constitution prohibits every "Tax or Duty . . . on Articles exported from any State." U.S. Const. art. I, § 9, cl. 5. This categorical provision "strictly prohibits any tax or duty, discriminatory or not, that falls on exports during the course of exportation." *United States v. IBM Corp.*, 517 U.S. 843, 848 (1996). Congress may tax the manufacturing of goods, including goods destined for export, but those goods become immune from federal taxation once they "enter[] the course of exportation." *Id.* at 849.

Whether a tax permissibly falls on goods prior to exportation, or instead unconstitutionally is imposed during exportation, depends on the "taxable event." *Id.* When a tax is imposed upon the *sale* of a good for export, that tax is unconstitutional because "the taxable event, the transfer of title, occur[s] at the same moment the goods entered the course of exportation." *Id.* (citing *A.G. Spalding & Bros. v. Edwards*, 262 U.S. 66, 69-70 (1923)).

2. Federal law imposes a wide array of taxes and fees on American-made and -produced goods. Among these is a tax on coal. Congress enacted the Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. §§ 1201 *et seq.*, in 1977. The statute authorizes the Department of the Interior's Office of Surface Mining (OSM) to impose a reclamation fee on "coal produced" by covered coal mining operations. *Id.* § 1232(a). The tax is the lesser of a specified amount per ton or "10 per centum of the value of the coal at the mine." *Id.* The SMCRA does not compel OSM to impose the tax at any particular point in the process of the coal's extraction, sale, processing, and delivery.

Pursuant to the statutory authorization to impose the tax, OSM in 1977 specified by regulation issued after notice and comment that the tax would be determined by the "weight and value *at the time* of initial bona fide *sale*, transfer of ownership, or use by the operator." 30 C.F.R. § 870.12(b)(1) (emphases added).

OSM revisited the issue in 1982 "to clarify the point in time of fee determination." 47 Fed. Reg. 28,574, 28,577 (June 30, 1982). OSM specified that the requirement that the "fee shall be determined . . . at the time of the initial bona fide sale, transfer of ownership, or use" referred to the "first transaction or use of the coal by the operator immediately after it is severed, or removed from a reclaimed coal refuse deposit," 30 C.F.R. § 870.12(b), (b)(1) (1983). Only "the actual gross weight" of the processed coal that is sold—at the time of its sale—matters for purposes of imposing the tax. *Id.* § 870.12(b)(3).

The distinction between imposing the tax upon sale rather than the initial extraction of the coal makes a considerable practical difference. The tax depends on the coal's weight and value, 30 U.S.C. § 1232(a), both of which can change between extraction and sale. If the weight of the coal is reduced during processing by the removal of impurities, the tax is lower than if it had been imposed at extraction. Conversely, if the coal increases in weight when exposed to the elements or during processing, the tax imposed at sale may be higher than it would have been if imposed during mining or processing. OSM's regulations thus specify that "[i]mpurities, including water, that have not been removed prior to the time of initial bona fide

sale, transfer of ownership, or use by the operator shall not be deducted from the gross weight." *Id.* § 870.12(b)(3)(i).

The market price for coal also can shift between the time the coal is first extracted from the ground and when it is later sold for export. OSM has consistently measured the value of the processed coal as of the time of its sale, rather than of raw coal as of the time of extraction. Pet. App. 53a-56a. Unless and until the coal is sold, no tax is imposed. *Id.*

Several coal companies filed suit against OSM's determination to impose the tax upon sale. The companies argued that by specifying that OSM should impose a fee on "coal produced," 30 U.S.C. § 1232(a), Congress had left OSM with no choice but to impose the tax on the coal at the time of extraction. OSM argued that its authority was not so limited, and that the statute could permissibly be construed to allow it to impose the tax upon sale. The D.C. Circuit accepted OSM's position, concluding that "we do not find the ordinary meaning of ['coal produced'] unambiguous." *See Drummond Coal Co. v. Hodel*, 796 F.2d 503, 505 (D.C. Cir. 1986). Hence, OSM acted within its discretion in adopting regulations that construe the statute to impose the tax at the time of sale. *Id.* at 505-08.

3. Petitioners in this case are sixty-seven domestic coal companies, which regularly enter into contracts to export coal to foreign customers. Petitioners mine the coal, move it to raw coal storage areas for temporary storage, and then feed it into a preparation plant for processing in accordance with the purchaser's specifications. *See Consolidation Coal Co. v. United States*, 54 Fed. Cl. 15, 16 (2002).

The coal is then loaded directly onto rail cars bound for the export terminal, sometimes after being stored temporarily. *Id.* The contracts specify that title passes, and thus the sale occurs, either upon loading of the coal onto the rail car at the mine for delivery to its transporting ship or at a later point in the export stream, such as upon loading onto the ocean vessel.

In 2001, petitioners filed this suit in the Court of Federal Claims. Petitioners sought a prospective declaration that the tax violates the Export Clause as applied to coal in the stream of export commerce, as well as reimbursement of taxes that had been unconstitutionally imposed.[1]

The court granted summary judgment in petitioners' favor. Pet. App. 69a. It observed that "[b]oth sides agree that the fee would be constitutional if imposed solely on extraction." Pet. App. 46a. Conversely, "given defendant's concession that the sale occurs in the export process, the fee . . . would be unconstitutional . . . if imposed at the time the coal is sold." *Id.*

Turning to the dispositive question of when the tax was assessed, the court rejected the Government's assertion that it was entitled to prevail on the ground that the statute gave OSM no choice but to impose the fee on coal when first extracted, rather than when later sold. In reality, the court recognized, the Government had previously

---

[1] The Court of Federal Claims initially dismissed the suit for lack of jurisdiction. *Consolidation Coal Co.*, 54 Fed. Cl. at 20. The Federal Circuit reversed and remanded. *Consolidation Coal Co. v. United States*, 351 F.3d 1374 (Fed. Cir. 2003).

persuaded the D.C. Circuit to uphold OSM's imposition of the tax upon sale by taking precisely the opposite position that the statutory language was ambiguous. Pet. App. 49a-51a. The Government's present arguments were accordingly unpersuasive and "directly contradicted" by the law of the D.C. Circuit. Pet. App. 49a.

The Court of Federal Claims further explained that OSM's position that the tax accrues upon extraction could not be reconciled with OSM's failure to tax unsold coal. In a prior case, the Government had "acknowledged that it 'does not now claim, and never has claimed, that an operator which mines coal . . . and places the coal in a coal stockpile prior to sale, should pay a reclamation fee . . . on that coal.'" Pet. App. 53a-54a (quoting *United States v. Consolidated Coal Co.*, No. 82-1077, slip op. at 3 (S.D.W. Va. Nov. 7, 1985)). That concession, the court concluded, was well-founded, as other courts had expressed the same understanding. *See* Pet. App. 54a-56a (citing *United States v. Tri-No Enters., Inc.*, 819 F.2d 154, 157 (7th Cir. 1987); *United States v. Consolidated Coal Co.*, 1987 WL 36307, at *1 (4th Cir. 1987) (unpublished); *United States v. Spring Ridge Coal Co.*, 793 F. Supp. 124, 127 (N.D.W. Va. 1992)).

Accordingly, because OSM imposed the tax "upon the sale of coal," and because (as the Government conceded) that sale occurred while the coal was in the export stream, the tax was unconstitutional. Pet. App. 56a, 69a.

4. On the Government's appeal, the Federal Circuit reversed. Preliminarily, the court of appeals accepted the central premise of petitioners'

argument: that a tax on the sale of coal bound for export would violate the Export Clause. Pet. App. 28a. The Federal Circuit also recognized that OSM determined the taxable weight and value of the coal at the time of sale, not extraction. Pet. App. 28a, 29a.

The Federal Circuit nonetheless deemed OSM's actual application of the tax irrelevant as a matter of law. Precisely because such a tax on the sale of coal bound for export would violate the Export Clause, the Federal Circuit asked instead whether the statute should be construed to contemplate that OSM would impose the tax upon initial extraction. Applying the doctrine of constitutional avoidance, the court construed the statute to tax only "coal extracted." *Id.* 29a.

The Federal Circuit recognized that in *Drummond Coal*, OSM had successfully taken the opposite position that it permissibly had imposed the tax upon the sale of coal. The D.C. Circuit had thus determined in *Drummond Coal* that the SMCRA was ambiguous and could reasonably be read by OSM to "include the entire process of extracting and selling coal," rather than "solely . . . the process of extraction." 796 F.2d at 505. The Federal Circuit, by contrast, concluded that the D.C. Circuit's interpretation would render the tax unconstitutional: if SMCRA encompassed the "entire process of extracting and selling coal – if it is a tax on extraction *and* sale – then, as it applies to sales that occur in the export process, it is an unconstitutional violation of the Export Clause." Pet. App. 28a.

The Federal Circuit believed that OSM's interpretation of the tax was overridden by the court's obligation to interpret the statute in a

constitutional manner. The Federal Circuit deemed *Drummond Coal* to be irrelevant because the D.C. Circuit "did not itself independently determine the meaning of the statutory term 'coal produced,' but instead gave *Chevron* deference to the regulatory definition of that term, which included post-extraction moisture and other impurities as part of the 'coal produced.'" Pet. App. 30a. In the view of the Federal Circuit, the courts are not "bound by any contrary assertions by the government regarding the statutory interpretation of 'coal produced' where the canon of constitutional avoidance mandates that we adopt the reasonable construction that as applied to the SMCRA reclamation fee 'coal produced' is limited to 'coal extracted.'" Pet. App. 30a.

5. The Federal Circuit remanded the case to the Court of Federal Claims for further proceedings. Pet. App. 31a. On remand, petitioners argued that the court of appeals' decision resolved only the prospective construction of the SMCRA, and did not preclude petitioners' right to reimbursement of taxes that OSM had in fact imposed on the sale of coal in export commerce. The court disagreed, holding that the Federal Circuit's decision entirely precluded petitioners' claim under the Export Clause. The court accordingly entered judgment in favor of the Government. Pet. App. 22a-23a.

6. On petitioners' appeal, the Federal Circuit affirmed. The court of appeals again invoked the doctrine of constitutional avoidance, deeming OSM's regulations implementing the SMCRA to apply only to the extraction of coal in order to avoid their invalidation under the Export Clause. Pet. App. 7a-8a. "The regulations, like the statute, use the term

'coal produced,' and we conclude that this term in the regulation must be construed consistent with the identical term in the statute. 'Coal produced' applies to 'coal extracted' rather than coal sold.'" *Id.*

The Federal Circuit concluded that OSM's actual practice of imposing the tax upon the sale of exported coal was no barrier to the court's recharacterization of the tax as a deferred assessment on the production of coal. In support, it relied on this Court's analysis of the constitutional principle that states are immune from federal taxation in *Liggett & Myers Tobacco Co. v. United States*, 299 U.S. 383 (1937). *See* Pet. App. 6a-8a. *Liggett* held that a federal tax on tobacco manufacturing did not violate the rule against federal taxation of state instrumentalities when applied to tobacco sold to a state institution. The Court reasoned that the fact that the tax was not payable until the tobacco left the factory or was sold (whichever came first) did not turn an otherwise unobjectionable manufacturing tax into an impermissible sales tax upon state purchases. 299 U.S. at 386. By analogy, the Federal Circuit concluded in this case, the reclamation fee could be characterized as a delayed tax on coal extraction, rather than a tax on coal sales. Pet. App. 7a-8a.

The Federal Circuit acknowledged that the timing of the tax liability in *Liggett* made no practical difference: unlike the application of the SMCRA fee to coal, which varies in weight and value between extraction and sale, the tax on the tobacco remained the same whether imposed at the moment of manufacturing or when the product left the factory. Pet. App. 7a. But the court of appeals nonetheless concluded that OSM's actual practice of charging a

tax based on the weight and value of the coal at sale could be ignored because the court had an obligation to construe the regulations to avoid constitutional doubt, even though OSM's regulations were unambiguous. Pet. App. 7a-9a.

REASONS FOR GRANTING THE WRIT

This Court has carefully drawn and rigorously enforced a bright line distinguishing lawful taxes imposed during manufacturing from unconstitutional taxes imposed upon sale for export. Taking care to forbid the Government's efforts to evade this foundational restriction on its taxing powers, this Court has "strictly enforced the Export Clause's prohibition against federal taxation of goods in export transit." *United States v. IBM*, 517 U.S. 843, 849 (1996).

The Federal Circuit's decision in this case represents a significant departure from that vigilance, which this Court must correct. The Government assessed a tax on the sale of exported coal – the fee is not assessed unless and until the *sale*, and the amount of the tax depends solely on the weight and value of the coal *at sale* rather than at the time of its extraction. As the lower courts both recognized, OSM previously succeeded in defending the lawfulness of this very tax scheme before the D.C. Circuit only by insisting that it had permissibly construed the SMCRA to impose a tax at the time of sale. OSM maintained that position, and uniformly imposed the tax upon sale, until this litigation. The Federal Circuit was able to deny the inevitable conclusion that the tax violates the Export Clause when applied to sales in export commerce only by

overriding OSM's own longstanding position, blinking reality, and retroactively recharacterizing the tax's imposition.

Review is also warranted because the decision below provides a ready roadmap for the Government to evade the clear and strict terms of the Constitution. The Federal Circuit's methodology can readily be employed to render the Export Clause all but toothless by recharacterizing virtually any export sales tax as a deferred tax on manufacturing.

The Federal Circuit's decision equally conflicts with this Court's precedent because it turns the canon of constitutional avoidance on its head. The court of appeals converted a mechanism to *prevent* future unlawful action into a tool to *excuse* past constitutional violations.

Finally, certiorari should be granted because the court of appeals' decision gives rise to a two-to-two circuit conflict over whether the canon of constitutional avoidance takes precedence over the deference owed to an agency's settled interpretation of a statute that it implements under a direct delegation from Congress. Here, the Federal Circuit invoked the canon to reject OSM's longstanding determination to impose the tax upon the sale of exported coal. That ruling is consistent with the precedent of the Tenth Circuit, but the Second and Ninth Circuits would hold that a court has no authority to reject the agency's prior interpretation of the statute, particularly in light of the D.C. Circuit's determination to defer to OSM's interpretation in *Drummond Coal*. The circuit split implicates challenges to virtually every unconstitutional

implementation of an ambiguous federal statute. This Court's intervention is accordingly required.

I. The Ruling Below Conflicts With This Court's Established Export Clause Jurisprudence In Upholding The Reclamation Fee As Applied By The Government To The Sale Of Exported Coal.

A. The Export Clause Prohibits A Tax On The Sale Of A Good For Export.

The imposition of a tax on the sale of coal bound for export violates the Constitution's Export Clause. The Constitution "categorically bars Congress from imposing any tax on exports." *United States v. United States Shoe Corp.*, 523 U.S. 360, 363 (1998). Unusual in its strictness and the vigor of its application, the Export Clause "allows no room for any federal tax, however generally applicable or nondiscriminatory, on goods in export transit." *Id.* at 367.

This Court has long held that this prohibition precludes taxes on the sale of goods in the stream of export commerce. In *A.G. Spalding & Bros. v. Edwards*, 262 U.S. 66, 67 (1923), for example, the Court considered a tax on the sale of baseball bats, as applied to sales for export. The Court explained that although the Export Clause permits Congress to tax goods during manufacturing even if the goods are destined for export, "[a]rticles in course of transportation cannot be taxed." *Id.* at 69. "The fact that the law under which the tax was imposed was a general law touching all sales of the class, and not aimed specially at exports, would not help the defendant," the Court explained, so long as the goods

were in the process of being exported at the time the tax was imposed. *Id.*

With respect to a sales tax, then, the "question is whether the sale was a step in exportation." *Id.* at 68. To answer that question, the Court observed, "we have to fix a point at which, in view of the purposes of the Constitution, the export must be said to begin." *Id* at 69. The Court held that the sale marks the beginning of exportation, and therefore cannot be taxed. *Id.* "The very act that passed the title and that would have incurred the tax had the transaction been domestic, committed the goods to the carrier that was to take them across the sea." *Id.*

B. The Government Has Administered The Reclamation Fee As A Tax On The Sale Of Coal In Export Commerce.

1. The SMCRA directs the OSM to impose a tax to be calculated "per ton of coal produced" or as "a per centum of the value of the coal at the mine." 30 U.S.C. § 1232(a). Because the weight and value of coal predictably change between the initial extraction of raw coal and the sale of processed coal, OSM in implementing this Congressional directive was required to choose the point in time at which the tax would be imposed. OSM chose the point of sale, rendering the application of the tax in plain violation of the Export Clause. *See A.G. Spalding*, 262 U.S. at 69.

First, OSM's regulations say so unambiguously: "The fee shall be determined by the weight and value *at the time of initial bona fide sale . . . .*" 30 C.F.R. § 870.12(b) (emphasis added).

Second, OSM specifically revised its regulations to "clarify the point in time of fee determination" by reaffirming "OSM policy in effect since initial implementation of the fee collection program": that the tax was imposed on the coal at the time of sale, not extraction. 47 Fed. Reg. 28,574, 28,577 (1982). It added to the regulations the statement that the "initial bona fide sale . . . shall be determined by the first *transaction* or use of the coal by the operator." 30 C.F.R. § 870.12(b)(1) (emphasis added). The revised regulations further provided that the "[i]mpurities that have not been removed prior to the time of the *initial bona fide sale* . . . shall not be deducted from the gross weight." *Id.* § 870.12(b)(3)(i) (emphasis added). Accordingly, the regulations made clear that the tax was *not* to be based on the weight of the coal at the time of extraction; so long as impurities are removed "prior to the time of the initial bona fide sale," they do not contribute to the taxable weight of the coal. Likewise, the revised regulations provided that the weight of any water or other impurities accumulating in or added to the coal during processing between extraction and sale would be taxed. *Id.* § 870.12(b)(3)(i) (1983).[2]

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[2] The Secretary subsequently amended the regulations to allow a deduction in weight for "excess moisture," to bring the fee methodology into accord with that used by the Internal Revenue Service in assessing the Black Lung tax. *See* 53 Fed. Reg. 19718 (May 27, 1988). The Secretary did not, however, alter his position that the value of the coal will be determined as of the time of sale, and that the coal's taxable weight will not include any impurities present at the time of extraction, so long as they are removed by the time of sale. Likewise, any

Third, consistent with its treatment of the sale as the taxable event, when OSM amended the rate of the tax in 2004, it applied the new rate to coal that was subsequently sold, even if that coal had been extracted before the new rate became effective. *See* 69 Fed. Reg. 56,122, 56,127-128 (Sept. 17, 2004).

Fourth, OSM has assessed the tax only if and when a sale takes place. In those instances in which producers have stockpiled coal for later sale, the Government has neither required payment of the tax at that time, nor calculated the value and weight of the coal as of the time of extraction. *See, e.g., United States v. Tri-No Enters., Inc.*, 819 F.2d 154 (7th Cir. 1987) (Government imposed tax when previously stockpiled coal was sold); *United States v. Consolidation Coal Co.*, No. 86-1001, 1987 WL 36307, at *1 (4th Cir. Jan. 30, 1987) (same); *United States v. Spring Ridge Coal Co.*, 793 F. Supp. 124, 127 (N.D.W. Va. 1992) (same). The Federal Circuit did not deny OSM's actual practice, but merely recognized that under OSM's interpretation of the statute liability would arise without regard to whether a sale occurred. Pet. App. 8a.

Fifth, in *Drummond Coal Co. v. Hodel*, 796 F.2d 503 (D.C. Cir. 1986), the D.C. Circuit deferred to and upheld OSM's decision to tax coal according to its weight and value at the time of sale, rather than extraction. OSM cannot have it both ways, construing the statute to mean one thing when its

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impurities adhering or added after extraction will be included in the taxable weight. *See* 30 C.F.R. § 870.12(b)(3)(i).

taxing methodology is challenged as unauthorized by the statute, and the opposite when the tax so administered is challenged under the Export Clause.

C. An Unconstitutional Tax On Sales For Export Is Not Saved By Recharacterizing That Tax As A "Deferred" Manufacturing Tax.

1. The Government cannot avoid the restrictions of the Export Clause through simple verbal maneuvering. Nearly every sales tax could be characterized as a "tax on manufacturing, collected at the time of sale." If that were sufficient to evade the Export Clause, then this Court would have reached the opposite result in *A.G. Spalding*, *supra*. The sales on baseball bats could just as easily have been characterized as a tax that accrued when the baseball bats were produced but was collected when the bats were sold. To be sure, the sales tax in that case was assessed as a percentage of the sales price. But the tax would have been no less unconstitutional if imposed as a flat, one-dollar charge on every sale. This Court specified that the determinative consideration was not the formula for the amount of the tax, but rather the *timing* of its application – *i.e.*, whether the goods were in the stream of export when the tax accrued. *A.G. Spalding & Bros. v. Edwards*, 262 U.S. at 69.

The Federal Circuit's decision thus provides a roadmap for broad-scale evasion of the Export Clause, one foreseen (and forbidden) by this Court's prior cases. The Court has warned that the "obstructions to exportation which it was the purpose [of the Clause] to prevent could readily be set up by

legislation nominally conforming to the constitutional restriction, but in effect overriding it." *United States v. Hvoslef*, 237 U.S. 1, 13 (1915). Accordingly, courts reviewing Export Clause challenges "'must regard things rather than names,' in determining whether an imposition on exports ranks as a tax." *United States Shoe Corp.*, 523 U.S. at 367 (quoting *Pace v. Burgess*, 92 U.S. 372, 376 (1876)). "The crucial question is whether the [tax] is a tax on exports in operation" as opposed to "nomenclature." *Id.* And here, there is no escaping that in operation, OSM imposed the reclamation fee as a tax on sales.

2. The Federal Circuit nonetheless purported to find precedent for its recharacterization in this Court's decision in *Liggett & Myers Tobacco Co. v. United States*, 299 U.S. 383 (1937). But that case is both doctrinally irrelevant and factually inapposite.

Liggett concerned the principle of state immunity from federal taxation, which has no textual or structural relationship to the Export Clause. The plaintiff in that case, Liggett & Myers, contended that a tax imposed upon certain tobacco products, which it sold to Massachusetts state hospitals, amounted to a "direct burden imposed upon the state." *Id.* at 386. This Court rejected that argument, finding that the tax was properly considered a "tax [ ] upon the manufacture of the tobacco," the effect of which upon the State was "indirect and imposed no prohibited burden." *Id.* The court based that conclusion principally on the fact that the "tax is laid upon each pound of manufactured tobacco irrespective of intrinsic value or price obtained upon sale." *Id.*

Liggett does not overrule this Court's unambiguous holding that the question whether a tax violates the Export Clause turns on the "taxable event" – here, the "sale" of the good. *United States v. IBM Corp.*, 517 U.S. 843, 848 (1996). The Federal Circuit's contrary decision renders this Court's precedent a nullity.

This Court has repeatedly cautioned that the "Export Clause's simple, direct, unqualified prohibition on any taxes or duties distinguishes it from other constitutional limitations on governmental taxing authority." *U.S. Shoe*, 523 U.S. at 368. The Court has thus rejected attempts to impose onto the Export Clause doctrines involving even the Import-Export Clause, *see id.* at 857, the Dormant Commerce Clause, *see IBM*, 517 U.S. at 851, and the Takings Clause, *see U.S. Shoe*, 523 U.S. at 368-69. If the Court has "hesitate[d] before adopting the analysis of our recent Import-Export Clause cases into our Export Clause jurisprudence," *IBM*, 517 U.S. at 857 – despite the fact that the two provisions are "textually similar," *id.* at 852, and "frequently interpreted . . . together," *id.* at 857 – it has even greater reason to resist reliance on cases implementing an implied restriction on federal burdens placed on state instrumentalities. *Cf. IBM*, 515 U.S. at 851 (concluding that the "meaning of the nontextual negative command of the dormant Commerce Clause" was uninformative of the meaning of the textual prohibition of the Export Clause). Accordingly, "decisions [that] involved constitutional provisions other than the Export Clause . . . do not govern here." *U.S. Shoe*, 523 U.S. at 368.

The structural command at issue in *Liggett* bears no relationship to the Export Clause. The central question under the Export Clause is one of *timing*: was the tax imposed on the item while it was in the export stream? The federalism question in *Liggett*, by contrast, turns on the degree and directness of the burden imposed on a state instrumentality. 299 U.S. at 386 (question is whether the tax imposed a "direct burden" on the state or instead "the effect was incidental, indirect, and [therefore] permissible").

Thus, the dispositive fact in *Liggett* – that the amount of the tax was measured as a percentage of the sale price, *id.* at 386 – is not important (much less determinative) in this challenge under the Export Clause. Because the Export Clause prohibits *any* "Tax or Duty" on exported articles, so long as the tax accrues while the item is in the export stream, it is unconstitutional no matter whether it is properly classified as a sales tax or not. *See, e.g., Fairbank v. United States*, 181 U.S. 283, 283, 289-90 (1901) (flat ten-cent stamp tax on bills of lading held unconstitutional).

In any event, even if *Liggett* were useful precedent, it is factually distinguishable. The decision in *Liggett* turned critically on the fact that the tobacco tax at issue there did not depend "on the intrinsic value or price obtained upon sale." 299 U.S. at 386. But the reclamation fee in this case depends directly on the "intrinsic value" of petitioners' coal, being set at "10 per centum of the value of the coal," up to a capped amount per ton. 30 U.S.C. § 1232(a).

D. The Canon Of Constitutional Avoidance Does Not Authorize A Court To Displace An Agency's Interpretation Of The Statute Or To Ignore The Way In Which A Statute Has Actually Been Applied.

The decision below finds no more support in the canon of constitutional avoidance. In fact, the Federal Circuit's dramatic misapplication of that doctrine gives rise to a circuit conflict and provides an independent ground for certiorari.

1. The Federal Circuit erred first in invoking the canon of constitutional avoidance to construe the SMCRA in direct conflict with OSM's regulations and the agency's consistent practice.

The court of appeals did not dispute that the statutory language of the SMCRA was ambiguous as to whether the tax it imposed accrued at sale or extraction. Pet. App. 29a-30a. It acknowledged that in *Drummond Coal*, the D.C. Circuit had faced that same ambiguity and upheld OSM's regulations measuring the reclamation fee as of the time of sale. *Id.* The Federal Circuit's resort to the canon of constitutional avoidance is consistent with the precedent of the Tenth Circuit. *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1249 (10th Cir. 2008).

But in direct conflict with the ruling below and the Tenth Circuit's precedent, the Second and Ninth Circuits would hold that a court of appeals does not have authority to reject OSM's reasonable interpretation of the statute. In *Garcia-Villeda v. Mukasey*, 531 F.3d 141, 149 (2d Cir. 2008), an immigrant challenged the validity of a regulation authorizing an immigration officer to remove an

alien, without holding a hearing, if the officer determined that the alien had unlawfully re-entered the country after having been previously removed. "Invoking the doctrine of constitutional avoidance," the immigrant argued that "the regulation [was] an impermissible interpretation of the statute," which should be construed to require a hearing in order to avoid a serious question under the Due Process Clause. *Id.* at 149. But the Second Circuit held that the doctrine was inapplicable. "[O]nce an ambiguous statute has been interpreted by the agency in charge of its implementation, [courts] lack the 'authority to re-construe the statute, even to avoid constitutional problems.'" *Id.* (citation omitted). In reaching this conclusion, the Second Circuit quoted and relied on the en banc Ninth Circuit's identical holding in *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 493 (9th Cir. 2007) (en banc).

In this case, the Secretary has, through his regulations, authoritatively interpreted the SMCRA as imposing a tax on sales. *See Drummond Coal*, 796 F.2d at 505. In these circumstances, the Second and Ninth Circuits would refuse to apply the canon of constitutional avoidance to adopt a contrary construction. As this Court squarely held in *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005), the agency's reasonable construction of an ambiguous statute precludes a federal court from overriding that reading under principles of statutory construction.

An agency is, of course, free to change its interpretation, so long as it has a reasonable basis for the change and complies with the procedural requirements of the Administrative Procedure Act for

amending its regulations. *See id.* at 981-82. But in this case OSM has not altered its regulations. It is has merely reversed course in litigation. Such strategic shifting of positions is not entitled to any deference. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate."). In such circumstances, the agency's construction is the one that must be measured against the requirements of the Constitution. *See Garcia-Villeda*, 531 F.3d at 149-50 (reviewing constitutionality of statute as construed by agency, rather than applying doctrine of constitutional avoidance); *Morales-Izquierdo*, 486 F.3d at 495-98 (same).

2. The Federal Circuit compounded its error by inexplicably applying the constitutional avoidance canon to recharacterize OSM's regulations and *conduct* as consistent with the Export Clause.

Even if the Federal Circuit had the authority to construe the SMCRA as imposing a tax on extraction rather than sale, that holding was insufficient to decide petitioners' refund claims, which turned not on any alleged facial invalidity of the statute or regulations, but rather on the fact that OSM had implemented the reclamation fee as a tax on coal export sales (whether that implementation was authorized by the statute or not). The court of appeals rejected petitioners' claim by conclusively presuming, in the name of constitutional avoidance, that OSM had in fact administered the tax in accordance with the Federal Circuit's narrowing construction of the statute, deeming irrelevant as a

matter of the law the uncontested facts of OSM's actual practice. Pet. App. 7a-8a.

That decision turned the Court's constitutional avoidance canon on its head. The canon generally operates to restrict agency authority in the face of constitutional doubt. *See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568, 575 (1988); Robert W. Scheef, *Temporal Dynamics in Statutory Interpretation: Courts, Congress, and the Canon of Constitutional Avoidance*, 64 U. PITT. L. REV. 529, 542 (2003). It is not uncommon, therefore, that when viewed in light of the Court's narrowing construction, *prior* agency action will be deemed in violation of a statute or regulation (thereby avoiding the separate constitutional challenge). For example, in *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953), this Court considered whether a regulation authorized the Attorney General to deny a hearing to a lawful permanent resident prior to denying him re-entry into the country. Because that construction of the regulation raised substantial due process questions, the Court construed the regulation as not permitting the denial of a hearing. *Id.* at 598-99. In light of that restrictive reading of the regulation, the Court held that the Attorney General's denial of a hearing was unlawful and awarded the petitioner relief. *Id.* at 603.

Notably, the Court in *Kwong Hai Chew* did not apply the canon of constitutional avoidance to avoid the conclusion that the Attorney General had acted illegally. The Court did not, in other words, conclude that because the regulations were properly construed to require a hearing, the Attorney General must have

given one to Chew. Yet that is exactly what the court of appeals did in this case – after concluding that the statute and regulations required OSM to implement a tax on extraction rather than sales, it conclusively assumed that the tax OSM actually imposed must have conformed to that interpretation.

Although the canon of constitutional avoidance aids a court in choosing between reasonable constructions of a statute when parties seek *prospective* relief, it does not allow a court to rewrite history to conclude that an agency acted lawfully *in the past* and may accordingly retain the fruits of its unconstitutional conduct. The canon of constitutional avoidance has no application to whether OSM in fact ran afoul of the Export Clause.

3. Review is also warranted to resolve the circuit conflict over whether, under the SMCRA and OSM's implementing regulations, the tax is properly imposed upon extraction or instead upon sale of coal. Currently, different taxes would be imposed on the identical sale based on the coincidence of the court that considered the question. Although *Drummond Coal Co. v. Hodel*, 796 F.2d 503 (D.C. Cir. 1986), did not involve a direct challenge under the Export Clause, the central question in both that case and this is the same – whether OSM has construed and implemented the reclamation fee as a tax on extraction or sale of coal. The D.C. Circuit upheld OSM's decision to assess the tax based on the weight of coal at time of sale – including the weight of post-extraction moisture gain, and excluding the weight of pre-sale removal of impurities – only because that court accepted the Secretary's interpretation of the statute as taxing the "entire process of extracting and

selling coal." 796 F.2d at 505. In this case, the Federal Circuit looked at the same regulations and reached the opposite conclusion.

Likewise, the Fourth Circuit has addressed the same core issue, and concluded that the "critical date for the application of the" SMCRA was "not the date on which the coal was originally extracted from the ground, but the date on which the economic advantage is gained," namely, when the company "sold the coal." *United States v. Consolidation Coal Co.*, No. 86-1001, 1987 WL 36307, at *1 (4th Cir. Jan. 30, 1987) (unpublished). *See also United States v. Spring Ridge Coal Co.*, 793 F. Supp. 124, 127 (N.D.W. Va. 1992) (tax is not calculated and imposed "until [the coal] ha[s] been cleaned, processed and sold").

II. The Federal Circuit's Decision Has Nationwide Implications And Warrants This Court's Review.

Certiorari is warranted for the further reason that the ruling below has broad implications both for the administration of an important tax and for the proper application of the constitutional avoidance canon.

The constitutionality of the reclamation fee as applied to exported coal has obvious importance for an important sector of our economy, at a time when the need to improve the nation's balance of trade is paramount. *See, e.g.*, Zachary A. Goldfarb & Perry Bacon Jr., *Obama Brings Industry To Table*, WASH. POST., Jan. 22, 2011, at A1 (quoting President as explaining that "[f]or America to compete around the world, we need to export more goods around the world").

In addition, the Federal Circuit's maneuvering to avoid the plain import of this Court's cases, if left unreviewed, provides a roadmap for evasion of the Export Clause whenever the Government chooses to argue that an export sale is merely the point of deferred collection rather than the imposition of a tax. The Government has required repeated reminders from this Court of the constitutional limits on its power to tax exports. *See, e.g.*, *United States v. U.S. Shoe Corp.*, 523 U.S. 360, 363 (1998); *United States v. IBM Corp.*, 517 U.S. 843 (1996); *A.G. Spalding & Bros. v. Edwards*, 262 U.S. 66, 67 (1923); *United States v. Hvoslef*, 237 U.S. 1, 13 (1915). The Court's lessons have once again been forgotten, and the time has come again for the Court to reestablish that the unambiguous constitutional command of the Export Clause cannot be circumvented.

Moreover, a question at the core of this case – when the reclamation tax accrues – has broad significance not only for the constitutionality of the tax as applied by OSM, but also to how the tax applies in non-export contexts. *See, e.g.*, *Drummond Coal Co. v. Hodel*, 796 F.2d 503 (D.C. Cir. 1986) (timing of tax affects when weight and value of coal should be measured); *United States v. Consolidation Coal Co.*, No. 86-1001, 1987 WL 36307, at *1 (4th Cir. Jan. 30, 1987) (unpublished) (timing affects taxation of reclaimed coal extracted prior to effective date of statute); *United States v. Tri-No Enters., Inc.*, 819 F.2d 154, 158 (7th Cir. 1987) (noting issue affects "economic incentive to remove otherwise abandoned (and possibly environmentally harmful) stockpiles").

Review is warranted now because of the outsized role the Federal Circuit plays in the administration

of the nation's tax laws. Tax refund claims are frequently litigated in the Court of Federal Claims, over which the Federal Circuit has exclusive appellate jurisdiction. *See* 28 U.S.C. § 1295(a)(3); *see also, e.g.*, *United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1 (2008); Steven L. Schooner, *The Future: Scrutinizing The Empirical Case For The Court Of Federal Claims*, 71 GEO. WASH. L. REV. 714, 720 (2003) (noting that "[a]pproximately one-quarter of the cases before the Court [of Federal Claims] involve tax refund suits") (citation omitted).

Finally, the Federal Circuit's application of the canon of constitutional avoidance – in conflict with the decisions of this Court and other circuits – has broad implications far beyond this particular taxation scheme. Its assertion of authority to displace an agency's construction of an ambiguous federal statute in the name of constitutional avoidance applies to any statute, including the immigration provisions addressed by the Second and Ninth Circuits. Significantly, although the Federal Circuit exercised that power in this case to save an otherwise unconstitutional statute, in other cases the doctrine could be used to overturn an entirely reasonable agency construction that, in the end, *would* withstand constitutional scrutiny. *See, e.g.*, *Morales-Izquierdo*, 486 F.3d at 504-05 (Thompson, J., dissenting) (arguing that majority should have applied canon of constitutional avoidance to adopt a more alien-friendly interpretation of statute even if regulation was otherwise reasonable and would not violate the Constitution). At the same time, the Federal Circuit's inversion of the canon to counter-factually presume that OSM had administered the

reclamation tax in accordance with the court's saving construction creates a model for immunizing clearly unconstitutional agency action whenever the Government is alleged to have violated the Constitution in the course of administering an arguably ambiguous federal statute.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 9, 2011

APPENDIX

TABLE OF CONTENTS

APPENDIX A: Federal Circuit opinion (Aug. 2, 2010) 1a

APPENDIX B: U.S. Court of Federal Claims opinion (Mar. 4, 2009) 10a

APPENDIX C: Federal Circuit opinion (June 11, 2008) 25a

APPENDIX D: U.S. Court of Federal Claims opinion (Apr. 4, 2005) 32a

APPENDIX E: Federal Circuit order denying rehearing (Oct. 12, 2010) 70a

APPENDIX A

United States Court of Appeals,
Federal Circuit.

CONSOLIDATION COAL COMPANY, Consol of Pennsylvania Coal Company, Consol of Kentucky Inc., Eighty Four Mining Company, Helvetia Coal Company, Island Creek Coal Company, Kent Coal Mining Company, Keystone Coal Mining Corporation, Laurel Run Mining Company, McElroy Coal Company, Nineveh Coal Company, Quarto Mining Company, Eagle Energy, Inc., Elk Run Coal Company, Inc., Goals Coal Company, Green Valley Coal Company, Independence Coal Company, Inc., Knox Creek Coal Corporation, Marfork Coal Company, Inc., Martin County Coal Corporation, Peerless Eagle Coal Company, Performance Coal Company, Rawl Sales & Processing Company, Sidney Coal Company, Inc., Stone Mining Company, Jim Walter Resources, Inc., Eastern Associated Coal Corporation, Kingston Resources, Inc., Pioneer Fuel Corporation, Powder River Coal Company, Apogee Coal Company, Arch Western Resources, LLC, Conyon Fuel Company, LLC, Catenary Coal Company, Coal-Mac, Inc., Dal-Tex Coal Corporation, Hobet Mining, Inc., Mingo Logan Coal Company, Payter Branch Mining, Inc., Plateau Mining Corporation, Rag Cumberland Resources, L.P., Rag Emerald Resources, L.P., Twentymile Coal Company, Coastal Coal Company, LLC, Coastal Coal-West Virginia, LLC, Evergreen Mining Company, Mid-Vol Leasing, Inc., Mountaineer Coal Development Company, Old Ben Coal Company, Shipyard River Coal Terminal Company, Riverside Energy, Inc., Virginia Crews Coal Company,

Clintwood Elkhorn Mining Company, Gatliff Coal Company, Premier Elkhorn Coal Company, Perry County Coal Corporation, Glamorgan Coal Company, LLC, Terry Eagle, L.P., Nicholas-Clay Land & Mineral, Inc., Nicholas-Clay Company, LLC, Andalex Resources, Inc., Genwal Resources, Inc., Pacific Coast Coal Company, Usibelli Coal Mine, Inc., West Ridge Resources, Inc., United States Steel Mining Company, LLC and Covenant Coal Corporation, Plaintiffs-Appellants,

and

Wellmore Energy Company, LLC (formerly known as Rapoca Energy Company, LLC), Plaintiff-Appellant,

v.

UNITED STATES, Defendant-Appellee.

No. 2009-5083.

Aug. 2, 2010.

Rehearing and Rehearing En Banc Denied Oct. 12, 2010.

Steven H. Becker, Baker & McKenzie, LLP, of New York, NY, argued for all plaintiffs-appellants. With him on the brief were Suzanne I. Offerman, Lindsay A. Minnis and Charles H. Critchlow. John Y. Merrell, Jr., Merrell & Merrell, P.C., of McLean, VA, for plaintiff-appellant Wellmore Energy Company, LLC.

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Davidson, Director, and Tara K. Hogan, Trial Attorney. Of counsel was Daniel W. Kilduff, Office of the Solicitor, Department of the Interior, of Washington, DC.

Before LOURIE, FRIEDMAN, and MOORE, Circuit Judges.

MOORE, Circuit Judge.

The appellants in this case, a group of operators in the coal mining industry, appeal from the United States Court of Federal Claims' grant of summary judgment that certain regulations that implement the Surface Mining Control and Reclamation Act of 1977 (SMCRA) reclamation fee do not violate the Export Clause of the Constitution. We affirm.

BACKGROUND

This is the third opinion we have issued in this long-pending case. We explained the factual background in our previous opinion. *See Consolidation Coal Co. v. United States,* 351 F.3d 1374 (Fed.Cir.2003) (*Consol I*). Following our remand in *Consol I,* the Court of Federal Claims granted summary judgment in favor of the plaintiff coal producers on the issue of liability. *Consolidation Coal Co. v. United States,* 64 Fed.Cl. 718 (2005) (*Consol II*). We reversed on June 11, 2008, holding that the statutory fee was on "coal extracted" rather than "coal sold" and thus not an unconstitutional tax on exports. *Consolidation Coal Co. v. United States,* 528 F.3d 1344 (Fed.Cir.2008) (*Consol III*). On remand, the appellants (Consol, collectively) argued that *Consol III* only determined the constitutionality of the statute and separately argued the constitutionality of

the implementing regulations. The Court of Federal Claims disagreed with the appellants that *Consol III* did not decide the constitutionality of the regulations and entered summary judgment in favor of the government on March 4, 2009. *Consolidation Coal Co. v. United States*, 86 Fed.Cl. 384 (2009) (*Consol IV*). This appeal followed.

DISCUSSION

We review the Court of Federal Claims' grant of summary judgment and determinations of our scope of remand without deference. *Old Stone Corp. v. United States*, 450 F.3d 1360, 1367 (Fed.Cir.2006); *Laitram Corp. v. NEC Corp.*, 115 F.3d 947, 950 (Fed.Cir.1997). Summary judgment is appropriate when, drawing all justifiable inferences in the nonmovant's favor, there exists no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, (1986). We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

In *Consol IV*, the Court of Federal Claims determined that "the Federal Circuit [in *Consol III*] already addressed and resolved the constitutionality of both the reclamation fee statute and its implementing regulations." *Consol IV*, 86 Fed.Cl. at 389. It held that because we determined that "coal produced" in the statute means "coal extracted," then the phrase must have the same definition in the regulations. *Id.* It pointed to the fact that our opinion in *Consol III* discussed the "application" of the statute and the "method" by which OSM collects fees. *Id.* The Court of Federal Claims stated that this showed that we explicitly considered both the statutes and the

implementing regulations.

The Court of Federal Claims also found that even if we did not reach the issue explicitly in *Consol III*, we determined the issue by "necessary implication." *Int'l Rectifier Corp. v. IXYS Corp.*, 515 F.3d 1353 (Fed.Cir.2008) (holding that remand to determine a substantive issue necessarily decided a related procedural issue). The Court of Federal Claims held that because we found the statute constitutional in *Consol III* in spite of Consol's arguments there regarding the regulations, Consol cannot now be heard on the constitutionality of the regulations.

On appeal, Appellants argue that the Court of Federal Claims erred in determining that our decision in *Consol III* determined the constitutionality of the regulations at issue. They point to the *Consol III* opinion that states "the only question before this court is one of statutory interpretation of 30 U.S.C. § 1232(a)." *Consol III*, 528 F.3d at 1347.

The government responds that the Court of Federal Claims was correct; we considered the "application" of the statute and the "method" of collecting the reclamation fee; this is the equivalent of considering the implementing regulations. It also points out that in *Consol III* we cited the regulation in question as part of our analysis. *See id.* at 1347.

We will address directly the parties' arguments regarding the constitutionality of the implementing regulations. In *Consol III*, we held that the doctrine of constitutional avoidance required us to construe the phrase "coal produced" in 30 U.S.C. § 1232(a) to

mean "coal extracted." *Id.* at 1348. Appellants argue that although this definition applies to the statute, the regulations implemented by the Office of Surface Mining apply the fee to coal sold. As an example, appellants point to 30 C.F.R. § 870.12(a)-(b)(3)(iii) which states in pertinent part:

> (a) The operator shall pay a reclamation fee on each ton of coal produced for sale, transfer, or use, including the products of in situ mining.
>
> (b) The fee shall be determined by the weight and value at the time of initial bona fide sale, transfer of ownership, or use by the operator.

Appellants argue that because OSM collects the reclamation fee at the time of sale, it is necessarily a tax on "coal sold" rather than "coal extracted" regardless of the meaning of the term in the statute.

On the other hand, the government argues that liability under SMCRA incurs at the time of extraction; the collection of the fee is merely delayed until the time of sale, when operators typically weigh coal. The government argues that the time of collection cannot convert a constitutional tax or fee to an unconstitutional one, citing *Liggett & Myers Tobacco Co. v. United States,* 299 U.S. 383 (1937). In *Liggett,* the taxpayer was a manufacturer of tobacco and disputed a tax based on weight that applied to its product at the time of sale or removal from the factory. *Id.* at 385. Liggett sold the tobacco in question to the Commonwealth of Massachusetts for use at a state hospital. *Id.* Liggett and the Commonwealth argued that any tax on the sale amounted to an improper imposition of a tax on the

Commonwealth. *Id.* The Court held that this was not a tax on sale, but a proper tax on manufacture. *Id.* at 386. Although the statute delayed the collection of the tax from the time of manufacture to the time of sale or removal from the factory, this did not make it unconstitutional. *Id.* The Court found that the timing of the tax "mitigate[s] the burden" on manufacturers and "indicates no purpose to impose the tax upon ... sale." *Id.*

Appellants respond that *Liggett* is not applicable because the coal extracted is not the same product that the operators later sell. They argue that between extraction and sale, certain impurities like oil and antifreeze may accumulate,[1] while the operators remove other materials like dirt and rock that come along with coal as extracted. Although the extracted coal along with dirt and rock may be heavier-and thus subject to a higher fee-the appellants argue that this is the proper basis for the reclamation fee. The appellants also argue that this is a tax on sale rather than extraction because coal that an operator never sells will never be subject to the fee.[2]

Appellants' arguments in this appeal regarding the language of the regulation are much the same as those made in *Consol III*. Using the same canon of construction, the doctrine of constitutional avoidance, we hold that the regulations implementing SMCRA

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[1] 30 C.F.R. § 870.18 allows for deduction for excess moisture accumulated between extraction and sale.

[2] Our decision in *Consol III* addresses appellants' alternative arguments regarding *Drummond Coal Co. v. Hodel*, 796 F.2d 503 (D.C.Cir.1986). *Consol III*, 528 F.3d at 1347.

do not violate the Export Clause. *See Edward J. DeBartolo Corp. v. Fla. Gulf Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). The regulations, like the statute, use the term "coal produced," and we conclude that this term in the regulation must be construed consistent with the identical term in the statute. "Coal produced" applies to "coal extracted" rather than "coal sold."

The decision by OSM to delay collection of the reclamation fee to the time of sale simply "mitigate[s] the burden" on operators by not requiring the installation and use of weighing equipment at the time of extraction. Appellants' arguments regarding the change in weight between extraction and sale are not persuasive. In *Liggett*, the Court did not differentiate between an organic product like tobacco that could change weight and other products that could not. We see no reason to do so here.[3] The liability incurs at the time of extraction, and OSM merely collects the fee at the time of sale. The practice of stockpiling-holding product that never sells-should not change the result. If an operator extracts coal, but chooses not to sell it, it still incurs liability; the stockpiling simply creates a collection issue for OSM.

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[3] The government persuasively argues that the weight at the time of sale, without dirt and rocks, is a more accurate representation of the amount of "coal extracted" than if the operators took the weight at the time of extraction. We agree that it would appear contrary to our decision in *Consol III* to levy a fee on dirt and rocks as part of "coal extracted."

We hold that all of OSM's challenged regulations for collecting the reclamation fee under SMCRA, like the statute itself, apply to "coal extracted" and do not violate the Export Clause.

AFFIRMED

APPENDIX B

United States Court of Federal Claims.
CONSOLIDATION COAL COMPANY, et al.,
Plaintiffs,
v.
The UNITED STATES, Defendant.
Wellmore Energy Co., LLC, Plaintiff,
v.
The United States, Defendant.

Nos. 01-254C, 01-442C.
March 4, 2009.

Steven H. Becker, New York City, attorney of record for Consolidation Coal Company, et al, and Paul A. Horowitz, Charles H. Critchlow, and Suzanne I. Offerman, of counsel. John Y. Merrell, Jr., McLean, Virginia, attorney of record for Wellmore Energy Co., LLC.

Tara K. Hogan, Department of Justice, Washington, D.C., with whom was Assistant Attorney General Gregory G. Katsas, for Defendant. Jeanne E. Davidson, Director, Todd M. Hughes, Deputy Director, and Daniel W. Kilduff, of counsel, Department of the Interior.

OPINION & ORDER

FUTEY, Judge.

This case comes before the Court on the parties' cross motions for summary judgment following a remand from the United States Court of Appeals for the Federal Circuit. Plaintiffs are operators of coal

mining operations. Pursuant to Title IV of the Surface Mining Control and Reclamation Act of 1977 ("SMCRA") and its implementing regulations, plaintiffs paid a reclamation fee on coal, some of which was exported to foreign customers. Throughout this lengthy litigation, plaintiffs have maintained that the reclamation fee, as applied to exports, violates the Export Clause of the United States Constitution. In their instant motion, notwithstanding the Federal Circuit's finding that the reclamation fee is constitutional, plaintiffs assert that the regulations through which the fees are imposed violate the Export Clause. Specifically, plaintiffs contend that the Federal Circuit did not resolve the constitutionality of the regulatory scheme and that the D.C. Circuit's decision in *Drummond Coal Co. v. Hodel,* confirms that the reclamation fee regulations violate the Export Clause. 796 F.2d 503 (D.C.Cir.1986). Plaintiffs request that this Court grant their motion for summary judgment on the issue of liability and issue a new money judgment in Jim Walter Resources' favor.

Defendant conversely asserts that the Federal Circuit's Opinion fully disposed of the case and mandates dismissal by this Court. In the alternative, defendant contends that the reclamation fee regulations do not violate the Export Clause; that even if the regulations were unconstitutional, plaintiffs would remain obligated to pay reclamation fees pursuant to statute; and that plaintiffs' argument amounts to a rulemaking challenge over which this Court lacks jurisdiction. Defendant requests that this Court grant its motion for summary judgment and dismiss plaintiffs' claims.

Presently before the Court are: Plaintiffs' Post-Remand Motion For Summary Judgment, Defendant's Response In Opposition To Plaintiffs' Post-Remand Motion For Summary Judgment And Cross-Motion For Summary Judgment; Plaintiffs' Reply Brief In Support Of Post-Remand Motion For Summary Judgment And Brief In Opposition To Defendant's Cross-Motion For Summary Judgment; Defendant's Reply To Plaintiffs' Response To Defendant's Cross-Motion For Summary Judgment; and Defendant's Supplemental Appendix. The Court held oral argument on the motions for summary judgment on February 3, 2009.

1. *Background*[1]

In 1977, Congress enacted the SMCRA to protect the population and the environment from the possible negative side effects of surface coal mining. *See* 30 U.S.C. § 1202(a) (2009). Congress determined that the burden of restoring the mining lands should be borne by the coal industry. H.R. REP. NO. 218, at 136 (1977), *reprinted in* 1977 U.S.C.C.A.N. 593, 668. In

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[1] The facts were discussed in detail in the Court's Opinion granting defendant's motion to dismiss, *Consolidation Coal Co. v. United States*, 54 Fed.Cl. 14, 15-16 (2002) ("*Consolidation I*"); in the Federal Circuit's decision, *Consolidation Coal Co. v. United States*, 351 F.3d 1374, 1376-77 (Fed.Cir.2003); and in the Court's Opinion granting plaintiffs' motion for summary judgment, *Consolidation Coal Co. v. United States*, 64 Fed.Cl. 718, 720-22 (2005) ("*Consolidation II*"). Undisputed factual assertions are repeated herein and supplemented where necessary to provide factual information pertinent to this Opinion.

order to accomplish this goal, Congress established the Abandoned Mine Reclamation Fund ("Fund"), a trust fund used for the purpose of restoring various natural resources that had been damaged due to mining. 30 U.S.C. § 1231(a), (c)-(d) (2009). The Fund primarily derives revenue from an exaction imposed upon "coal produced." *Id.* § 1232(a) (2009); 30 C.F.R. § 870.12(a) (2009).

Specifically, the SMCRA provides:

> All operators of coal mining operations subject to the provisions of this chapter shall pay to the Secretary of the Interior, for deposit in the fund, a reclamation fee of 35 cents per ton of coal produced by surface coal mining and 15 cents per ton of coal produced by underground mining or 10 per centum of the value of the coal at the mine, as determined by the Secretary, whichever is less....

30 U.S.C. § 1232(a) (2001).[2] The Secretary of the Interior ("Secretary") subsequently promulgated regulations implementing the reclamation fee, pursuant to its authority under 30 U.S.C. § 1211(c)(2) (2009) (giving the Secretary the power to "publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of this chapter."). The regulations provide that "[t]he operator shall pay a reclamation fee on each ton of

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[2] The current version of the SMCRA provides for a reclamation fee of 31.5 cents per ton of coal produced by surface mining and 13.5 cents per ton of coal produced by underground mining. *See* 30 U.S.C. § 1232(a).

coal produced for sale, transfer, or use...." 30 C.F.R. § 870.12(a). Additionally, "[t]he fee shall be determined by the weight and value at the time of initial bona fide sale, transfer of ownership, or use by the operator." *Id.* § 870.12(b). Finally, "[t]he weight of each ton shall be determined by the actual gross weight of the coal," including "[i]mpurities that have not been removed prior to the time of initial bona fide sale, transfer of ownership, or use by the operator." *Id.* § 870.12(b)(3)(i).

In accordance with the SMCRA and its implementing regulations, plaintiffs paid reclamation fees on coal, some of which was sold to foreign customers. On April 27, 2001, Consolidation Coal Company brought suit in the United States Court of Federal Claims alleging that the reclamation fee, as applied to coal for export, violated the Export Clause of the United States Constitution.[3]

a. ***Consolidation I***

On August 14, 2002, the Court dismissed plaintiffs' complaint for lack of subject matter jurisdiction. The SMCRA specifically provides that the United States District Court for the District of Columbia has jurisdiction over challenges to regulations promulgated pursuant to the SMCRA, and that petitions "shall be filed ... within sixty days from the date of such action [by the Secretary], or after such date if the petition is based solely on

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[3] Plaintiffs initially asserted a claim under the Takings Clause as well; however, that claim was subsequently withdrawn.

grounds arising after the sixtieth day." 30 U.S.C. § 1276(a)(1)(2009). Because plaintiffs were challenging the implementing regulations, the Court determined that it lacked jurisdiction to hear plaintiffs' claims. The United States Court of Appeals for the Federal Circuit, however, reversed the Court's decision on appeal, and remanded the case for further proceedings. The Federal Circuit found that "the Export Clause provides the coal producers with an independent self-executing cause of action that allows for Tucker Act jurisdiction in the Court of Federal Claims." *Consolidation Coal Co.,* 351 F.3d at 1379. Moreover, because Congress did not unambiguously withdraw Tucker Act jurisdiction over constitutional challenges to the reclamation fee regulation, the Court could properly hear plaintiffs' claims. *See Id.* at 1380-81.

b. ***Consolidation II***

Following the Federal Circuit's remand, the Court granted plaintiffs' first motion for summary judgment on April 4, 2005, finding that imposition of the reclamation fee on coal for export violated the Export Clause. The crucial inquiry was whether the fee on "coal produced" is imposed solely upon extraction of the coal, or upon the extraction and sale of the coal. *See Consolidation II,* 64 Fed.Cl. at 724. If imposed upon extraction alone, the fee is constitutional; if imposed upon the extraction and sale of coal, however, the fee is unconstitutional. *Id.* The Court considered both the reclamation fee statute and regulations, and ultimately relied on the D.C. Circuit's finding in *Drummond,* that the term "production" under the SMCRA "could reasonably be

interpreted to include the entire process of extracting and selling coal, complete from pit to buyer's door." 796 F.2d at 505. The Court therefore concluded that the term "coal produced" as used in the statute and regulations is not confined to extraction and, because the fee is imposed at the time of sale, it violates the Export Clause. *Consolidation II*, 64 Fed.Cl. at 726-27.

On June 11, 2008, the Federal Circuit reversed the Court's finding that "application of the [SMCRA] reclamation fee to export sales of coal violates the Export Clause of the Constitution." *Consolidation Coal Co. v. United States*, 528 F.3d 1344, 1346 (2008). The Federal Circuit agreed with the Court that if the reclamation fee is imposed upon extraction alone, it is constitutional; whereas, if it is imposed upon extraction and sale, it is unconstitutional in violation of the Export Clause. *Id.* at 1347. Nevertheless, the Federal Circuit relied upon the canon of constitutional avoidance to preserve the constitutionality of the reclamation fee. The court examined both the SMCRA and its implementing regulations, and found that the meaning of the term "coal produced" in the SMCRA is ambiguous, that it "can reasonably be interpreted to mean 'coal extracted,' and that such an interpretation avoids a potential violation of the Export Clause." *Id.* That interpretation therefore prevailed. *Id.* at 1348. The Federal Circuit consequently reversed the Court's grant of summary judgment, and remanded the case to the Court for "proceedings consistent with this opinion." *Id.*

Upon resumption of proceedings before the Court, plaintiffs insisted upon filing a renewed motion for

summary judgment. The policy of the Court is not to reject a request by a party to file pleadings regarding a potentially pending legal issue; plaintiffs filed their Post-Remand Motion for Summary Judgment with the Court on September 3, 2008.

2. *Discussion*

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. RCFC 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Jay v. Sec'y of Dep't of Health & Human Servs.*, 998 F.2d 979, 982 (Fed.Cir.1993). A fact is material if it might significantly affect the outcome of the suit under the governing law. *Anderson*, 477 U.S. at 248. The party moving for summary judgment bears the initial burden of demonstrating the absence of any genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). If the moving party demonstrates an absence of a genuine issue of material fact, the burden then shifts to the non-moving party to show that a genuine issue exists. *Sweats Fashions, Inc. v. Pannill Knitting Co., Inc.*, 833 F.2d 1560, 1562-63 (Fed.Cir.1987). Alternatively, if the moving party can show that there is an absence of evidence to support the non-moving party's case, then the burden shifts to the nonmoving party to proffer such evidence. *Celotex*, 477 U.S. at 325. The court must resolve any doubts about factual issues in favor of the party opposing summary judgment, to whom the benefits of all favorable inferences and presumptions run. *Litton Indus. Prods., Inc. v. Solid State Sys. Corp.*, 755 F.2d 158, 163 (Fed.Cir.1985); *H.F. Allen Orchards v. United*

States, 749 F.2d 1571, 1574 (Fed.Cir.1984).

The fact that both parties have moved for summary judgment does not relieve the court of its responsibility to determine the appropriateness of each party's motion. *Prineville Sawmill Co., Inc. v. United States*, 859 F.2d 905, 911 (Fed.Cir.1988) (citing *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed.Cir.1987)). A cross-motion is a party's claim that it alone is entitled to summary judgment. *A Olympic Forwarder, Inc. v. United States*, 33 Fed.Cl. 514, 518 (1995). Therefore, it does not follow that if one motion is rejected, the other is necessarily supported. *Id.* Rather, the court must evaluate each party's motion on its own merit and resolve all reasonable inferences against the party whose motion is under consideration. *Id.* (citing *Corman v. United States*, 26 Cl.Ct. 1011, 1014 (1992)).

Plaintiffs' pending motion for summary judgment is premised upon their allegation that the Federal Circuit "left open for resolution by this Court on remand[ ] the question of whether [Department of Interior's Office of Surface Mining Reclamation and Enforcement ('OSM')]'s *administration* of the statute, through its regulations, imposes the reclamation fee on coal extracted *and sold*, and thus violates the Export Clause when applied to export sales of coal." Pls.' Br. in Supp. of Post-Remand Mot. for Summ. J. at 2 (emphasis in original). Plaintiffs assert that the issue of constitutionality of the regulations is distinct from that of the constitutionality of the statute, and further contend that the reclamation fee regulations are unconstitutional as applied to exports. *Id.* at 4. Specifically, plaintiffs argue that *Drummond*

confirms that the regulations interpret the term "coal produced" to mean both the extraction and sale of coal, and that the application of the reclamation fee through the regulations therefore violates the Export Clause. *Id.* at 3. Defendant, on the other hand, asserts that the Federal Circuit's decision disposes of all plaintiffs' statutory and regulatory claims, and that plaintiffs' complaint must consequently be dismissed.

a. *Applicability of Drummond*

Plaintiffs' primary argument is based on the D.C. Circuit's decision in *Drummond*. *See* 796 F.2d 503. Plaintiffs assert that *Drummond* confirms that OSM's regulations interpret the term "coal produced" as encompassing both the extraction and sale of coal, and plaintiffs argue that this Court should find the same. Nevertheless, plaintiffs unsuccessfully advanced the same argument in their first motion for summary judgment.

In *Drummond*, the plaintiff challenged a revision to the reclamation fee regulation; the challenged revision resulted in the inclusion of excess moisture in the gross weight of the coal upon which the reclamation fee was assessed. *See id.* at 504; *see also* 30 C.F.R. § 870.12(b)(3)(i) (1985). The plaintiff argued that the regulation exceeded the Secretary's statutory authority because the term "coal produced" as used in the statute was limited to mean "coal extracted," and therefore did not encompass moisture added to the coal post-extraction. *Id.* Both the district court and the D.C. Circuit, however, found the term "coal produced" to be ambiguous. *Id.* at 505; *Drummond Coal Co. v. Hodel*, 610 F.Supp. 1489, 1497

(D.D.C.1985). The Court of Appeals consequently determined that the Secretary's regulation was owed deference in the absence of a showing of contrary Congressional intent. *Id.* Significantly, the Court of Appeals refrained from affirmatively defining the term "coal produced." *See Id.*

For the purposes of the issue presently before the Court, *Drummond* is inapposite. The Federal Circuit has specifically stated that the *Drummond* decision is not relevant to "[t]he issue of the constitutionality of the reclamation fee as applied to exports." *Consolidation Coal Co.*, 528 F.3d at 1347. Moreover, the Federal Circuit determined that the term "coal produced" in the SMCRA means "coal extracted." *Id.* at 1348. Therefore, Plaintiffs' continued reliance on *Drummond* to invalidate the reclamation fee regulations as unconstitutional is misplaced.

b. *Effect of the Federal Circuit's Decision*

In its decision of June 11, 2008, the Federal Circuit found that the SMCRA reclamation fee is constitutional. More specifically, the court held that the meaning of the term "coal produced" is limited to mean "coal extracted." *Id.* The same, pivotal term is used in the statute, which assesses the fee, as well as in the regulations, which address when the fee is collected; the Federal Circuit examined both the statute and the regulations to determine the meaning of the term. *See id.* at 1347. Defendant avers that the Federal Circuit's emphasis on the use of the term in the regulations and statute confirms that its construction of the term applies to both. *See* Def.'s Resp. in Opp'n to Pls.' Post-Remand Mot. for Summ. J. & Cross-Mot. for Summ. J. at 5. Plaintiffs counter

this claim, asserting that the Federal Circuit's construction of the term "coal produced" is limited to the use of that term in the statute, and that the meaning of the term in the regulations is separate and distinct. Pls.' Reply Br. at 1; Pls.' Br. in Supp. of Post-Remand Mot. for Summ. J. at 14. Nonetheless, during oral argument, plaintiffs conceded that the term "coal produced" means the same thing in the statute and its implementing regulations. Tr. at 12:18-22. Plaintiffs went on to argue that the issue of the definition is a "red herring," however, and that the real issue is the nature and operation of the regulations. Tr. at 11:3-4; 13:18-20.

Plaintiffs additionally contend that the Federal Circuit's decision in *Nufarm America's, Inc. v. United States*, stands for the proposition that the constitutionality of a statute and its regulations are to be considered separately. Pls.' Reply Br. at 1-2; *see* 521 F.3d 1366 (Fed.Cir.2008). In *Nufarm*, the plaintiff challenged a regulation as violating the Export Clause. *See* 521 F.3d 1366. The *Nufarm* plaintiff never challenged the constitutionality of the statute; consequently, neither the trial court nor the court of appeals considered it, and the plaintiff was subsequently permitted to raise the issue. *See Id.* Plaintiffs here contend that, like in *Nufarm*, the Federal Circuit considered only the constitutionality of the statute, and that this Court may therefore consider the constitutionality of the regulations separately on remand. Nevertheless, the facts here are easily distinguishable from those in *Nufarm*. Throughout this litigation, plaintiffs' claim has involved a challenge to the constitutionality of both the statute and the regulations; in *Nufarm*, the

constitutionality of the statute was never at issue. Furthermore, this Court's prior decision in *Consolidation II* considered both the statute and the regulations, as did plaintiffs' briefs before the Federal Circuit, and the Federal Circuit's Opinion. Thus, *Nufarm* is inapplicable here.

Moreover, the Court agrees with defendant that the Federal Circuit already addressed and resolved the constitutionality of both the reclamation fee statute and its implementing regulations. In its Opinion, the Federal Circuit expressly states that it "adopt[s] the reasonable construction that as applied to the SMCRA reclamation fee 'coal produced' is limited to 'coal extracted.'" *Consolidation Coal Co.*, 528 F.3d at 1348. The SMCRA reclamation fee is the subject of both the statute and the regulations; this language plainly applies to both. The Federal Circuit further clarifies its consideration of the regulatory scheme by discussing this Court's summary judgment opinion, which it is directly reviewing, as ruling that "*the method* by which the Office of Surface Mining Reclamation and Enforcement (OSM) collects its reclamation fee violates the Export Clause of the Constitution." *Id.* at 1346 (emphasis added). Finally, the Federal Circuit explicitly reverses this Court's finding that the "*application of* the [SMCRA] reclamation fee to export sales of coal violates the Export Clause of the Constitution." *Id.* (emphasis added). Plaintiffs allege that the Federal Circuit failed to address "the question of whether OSM's *administration* of the statute, through its regulations ... violates the Export Clause when applied to export sales of coal." Pls.' Br. in Supp. of Post-Remand Mot. for Summ. J. at 2. The Federal Circuit was, however,

clear that it was not only addressing the statute assessing the reclamation fee, but also the method by which the reclamation fee is collected: through OSM's regulations.

The Federal Circuit's decision in *Int'l Rectifier Corp. v. IXYS Corp.*, similarly confirms this finding. *See* 515 F.3d 1353 (Fed.Cir.2008). In *Int'l Rectifier*, the plaintiff attempted to raise a procedural issue on appeal that it had argued in a previous appeal in the same case. Notwithstanding the court's failure to explicitly address the issue in its earlier opinion, the court concluded that it had "necessarily rejected" the plaintiff's arguments as to that issue. *Id.* at 1360 (citing *Exxon Chem. Patents, Inc. v. Lubrizol Corp.*, 137 F.3d 1475, 1478 (Fed.Cir.1998)) ("[I]n some cases issues not explicitly addressed by an appellate court may nonetheless be decided by necessary implication."). The court explained that its earlier mandate as to other claims in the case implicitly required the district court to treat the contested issue the same way. *Id.* at 1360. The court also noted specifically that the contested issue was raised in both parties' briefs during the last appeal. *Id.* Plaintiffs here attempt to distinguish *Int'l Rectifier* by arguing that the trial court's consideration of the claims on remand there necessitated a decision on the procedural issue, which plaintiffs claim is not the case here. Tr. at 30:14-20. Nonetheless, plaintiffs' reading of *Int'l Rectifier* is inaccurate. The critical factor in *Int'l Rectifier* was that the parties had fully briefed and argued the issue before the court. Likewise here, plaintiffs' briefs on appeal addressed both the regulations and the statute. This Court's prior decision fully considered the regulations and

the statute. *See Consolidation II,* 64 Fed.Cl. at 719, 721, 726. Most significantly, the Federal Circuit acknowledged its consideration of the regulations in its Opinion. Therefore, the Federal Circuit's Opinion fully disposed of plaintiffs' statutory and regulatory claims. The Court need not address the parties' remaining arguments, and defendant is entitled to summary judgment in its favor.

3. *Conclusion*

For the foregoing reasons, Plaintiffs' Post-Remand Motion For Summary Judgment is DENIED, and Defendant's Cross-Motion For Summary Judgment is ALLOWED. Accordingly, this case is hereby DISMISSED. The Clerk shall act accordingly. No costs.

IT IS SO ORDERED.

APPENDIX C

United States Court of Appeals,
Federal Circuit.

CONSOLIDATION COAL COMPANY, Consol of Pennsylvania Coal Company, Consol of Kentucky Inc., Eighty Four Mining Company, Helvetia Coal Company, Island Creek Coal Company, Kent Coal Mining Company, Keystone Coal Mining Corporation, Laurel Run Mining Company, McElroy Coal Company, Nineveh Coal Company, Quarto Mining Company, Eagle Energy, Inc., Elk Run Coal Company, Inc., Goals Coal Company, Green Valley Coal Company, Independence Coal Company, Inc., Knox Creek Coal Corporation, Marfork Coal Company, Inc., Martin County Coal Corporation, Peerless Eagle Coal Company, Performance Coal Company, Rawl Sales & Processing Company, Sidney Coal Company, Inc., Stone Mining Company, Apogee Coal Company, Arch Western Resources, LLC, Canyon Fuel Company, LLC, Catenary Coal Company, Coal-Mac, Co., Dal-Tex Coal Corporation, Hobet Mining, Inc., Mingo Logan Coal Co., Kingston Resources, Inc., Paynter Branch Mining, Inc., Pioneer Fuel Corporation, Plateau Mining Corporation, Rag Cumberland Resources, L.P., Rag Emerald Resources, L.P., Twentymile Coal Company, Coastal Coal Company, LLC., Coastal Coal-West Virginia, LLC, Eastern Associated Coal Corporation, Evergreen Mining Company, Mid-Vol Leasing, Inc., Mountaineer Coal Development Company, Old Ben Coal Company, Shipyard River Coal Terminal Company, Riverside Energy, Inc., Virginia Crews Coal Company, Clintwood Elkhorn Mining Company, Gatliff Coal Company, Premier

Elkhorn Coal Company, Perry County Coal Corporation, Glamorgan Coal Company, LLC, Terry Eagle L.P., Nicholas-Clay Land & Mineral, Inc., Nicholas-Clay Company, LLC, and Alex Resources, Inc., Genwal Resources, Inc., Pacific Coast Coal Company, Usibelli Coal Mine, Inc., Powder River Coal Company, West Ridge Resources, Inc., United States Steel Mining Company, LLC, Covenant Coal Corporation, and Rapoca Energy Company, LLC (now known as Wellmore Energy Company, LLC), Plaintiffs,
and
Jim Walter Resources, Inc., Plaintiff-Appellee,
v.
UNITED STATES, Defendant-Appellant.

No. 2007-5108.
June 11, 2008.

Before NEWMAN, PROST, and MOORE, Circuit Judges.

MOORE, Circuit Judge.

Appellant United States appeals from the United States Court of Federal Claims's grant of summary judgment that application of the Surface Mining Control and Reclamations Act of 1977 (SMCRA) reclamation fee to export sales of coal violates the Export Clause of the Constitution. We reverse and remand.

BACKGROUND

This case reaches us after a long history, including a previous appeal to this court. The factual

background was explained in our prior opinion and will not be repeated here. *See Consolidation Coal Co. v. United States,* 351 F.3d 1374 (Fed.Cir.2003). Following our remand in *Consolidation Coal,* the Court of Federal Claims granted summary judgment in favor of the plaintiff coal producers on the issue of liability. *Consolidation Coal Co. v. United States,* 64 Fed.Cl. 718 (2005). The court ruled that, as applied to coal that is exported, the method by which the Office of Surface Mining Reclamation and Enforcement (OSM) collects its reclamation fee violates the Export Clause of the Constitution.[1] The coal producers moved for judgment in favor of Jim Walter Resources (JWR), who is one of five test plaintiffs. On February 22, 2007, the court entered judgment in favor of JWR. This appeal followed.

DISCUSSION

We review the Court of Federal Claims's grant of summary judgment without deference. *Old Stone Corp. v. United States,* 450 F.3d 1360, 1367 (Fed.Cir.2006). "Statutory interpretation is a question of law that we review *de novo.*" *Wesleyan Co. v. Harvey,* 454 F.3d 1375, 1378 (Fed.Cir.2006). The only question before this court is one of statutory interpretation of 30 U.S.C. § 1232(a). Pursuant to the statute, the reclamation fee is imposed upon "coal produced" in the United States:

All operators of coal mining operations ...

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[1] The Export Clause provides that "No Tax or Duty shall be laid on Articles exported from any State." U.S. Const. art. I, § 9, cl. 5.

> shall pay ... a reclamation fee of 35 cents per ton of *coal produced* by surface mining and 15 cents per ton of *coal produced* by underground mining or 10 per centum of the value of the coal at the mine, as determined by the Secretary....

30 U.S.C. § 1232(a) (emphases added). Neither the statute nor OSM's regulations specifically define the term "coal produced." OSM's regulations provide:

> (a) The operator shall pay a reclamation fee on each ton of *coal produced* for sale, transfer, or use, including the products of in situ mining.
>
> (b) The fee shall be determined by the weight and value at the time of initial bona fide sale, transfer of ownership, or use by the operator.

30 C.F.R. § 870.12 (emphasis added). If "coal produced" in § 1232(a) refers solely to coal extracted then the disputed portion of the statute does not render the statute unconstitutional under the Export Clause. If, however, "coal produced" is interpreted to include the entire process of extracting and selling coal-if it is a tax on extraction *and* sale-then, as it applies to sales that occur in the export process, it is an unconstitutional violation of the Export Clause.

Where a possible construction of a statute would render the statute unconstitutional, courts must construe the statute "to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Bldg & Constr. Trades Council,* 485 U.S. 568, 575 (1988). This canon of constitutional avoidance is subject only to the qualification that the

interpretation that "save[s] a statute from unconstitutionality" must be reasonable-that is, the saving construction must not be "plainly contrary to the intent of Congress." *Id.* at 575. "The elementary rule is that every reasonable construction must be resorted to, in order to save the statute from unconstitutionality." *Id.* (quoting *Hooper v. California,* 155 U.S. 648, 657 (1895)).

Both sides agree the reclamation fee would be constitutional if imposed solely on coal extracted. We agree with the government that "coal produced" in § 1232(a) can reasonably be interpreted to mean "coal extracted," and that this interpretation avoids a potential violation of the Export Clause. JWR argues that in *Drummond Coal Co. v. Hodel,* 796 F.2d 503 (D.C.Cir.1986) this same statutory language "coal produced" was interpreted as including both the extraction and sale of coal. In *Drummond,* however, the D.C. Circuit was not interpreting the statute in light of the potential conflict with the Export Clause. The issue of the constitutionality of the reclamation fee as applied to exports simply was not raised. *Id.* at 503-08. Moreover, the *Drummond* court did not conclude that the language of the statute mandated the construction, but rather it held that the statute was ambiguous: "Like the district court, we do not find the ordinary meaning of that term unambiguous: 'Production could reasonably be interpreted to include the entire process of extracting and selling coal, complete from pit to buyer's door, or it could refer solely to the process of extraction.'" *Id.* at 505. *Drummond* involved the validity of a government regulation that directed that in calculating the tax on the gross weight of coal after it had been mined but

before sale, the gross weight included impurities such as water that had not been removed. The court did not itself independently determine the meaning of the statutory term "coal produced," but instead gave *Chevron* deference to the regulatory definition of that term, which included water as part of the "coal produced." 796 F.2d at 507. In the present case, in contrast, the sole question is whether, in determining if the statute violates the constitutional prohibition of export taxes, "coal produced" properly is defined as "coal extracted." The government asserted that the plain meaning of the statute is that "coal produced" is to be interpreted as "coal extracted." Even if we were to assume that the statute is ambiguous as to the meaning of "coal produced," the government's construction must still prevail as it is the only reasonable construction which preserves the constitutionality of the statute.

JWR also argues that the position taken by the government in this case, that "coal produced" is limited to "coal extracted," is inconsistent with the position the government took in *Drummond*. Although the government disputes the argument that it has taken inconsistent positions, either way, the government's interpretation of "coal produced" in this case must prevail. Neither the government, nor this court, are bound by any contrary assertions by the government regarding the statutory interpretation of "coal produced" where the canon of constitutional avoidance mandates that we adopt the reasonable construction that as applied to the SMCRA reclamation fee "coal produced" is limited to "coal extracted."

For the foregoing reasons, we reverse the grant of summary judgment and remand for proceedings consistent with this opinion.

REVERSED and REMANDED

APPENDIX D

United States Court of Federal Claims.

CONSOLIDATION COAL COMPANY, et al.,
Plaintiffs,
v.
The UNITED STATES, Defendant.
Rapoca Energy Company, LLC, Plaintiff,
v.
The United States, Defendant.

Nos. 01-254C, 01-442C.April 4, 2005.

Attorneys and Law Firms

Steven Harlan Becker, New York, N.Y., attorney of record for plaintiff Consolidation Coal Company, et al.

John Y. Merrell, Jr., McLean, Virginia, attorney of record for plaintiff Rapaco Energy Company.

Luke Paul Levasseur, Department of Justice, Washington, D.C., with whom was Assistant Attorney General Peter D. Keisler, for defendant. David M. Cohen, Director, and Jeanne E. Davidson, Deputy Director.

John Smathers, Department of the Interior, of counsel.

OPINION AND ORDER

FUTEY, Judge.

This case comes before the court on plaintiffs' motion for summary judgment following a remand from the United States Court of Appeals for the Federal Circuit (Federal Circuit). Defendant opposes plaintiffs' motion and renews its motion to dismiss for failure to state a claim upon which relief can be granted. Plaintiffs are producers and exporters of coal. Pursuant to Title IV of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) and implementing regulations, plaintiffs paid a reclamation fee on coal which was exported to foreign customers. Plaintiffs maintain that the reclamation fee, as applied to exports, runs afoul of the Export Clause. Specifically, plaintiffs maintain that the reclamation fee is a tax impermissibly levied on the sale of coal after it has entered the stream of export. Plaintiffs contend that defendant's Commerce Clause argument is foreclosed by numerous court holdings which concluded that the reclamation fee is a tax. Defendant, on the other hand, asserts that the reclamation fee does not implicate the Export Clause as it is imposed pre-export on the production of coal. Defendant also contends that the reclamation fee is a valid exercise of Congress' power under the Commerce Clause.

Factual Background[1]

In 1977, Congress enacted the SMCRA to protect the population and the environment from the possible negative side effects of surface coal mining. 30 U.S.C. § 1202(a). Title V, 30 U.S.C. §§ 1251-79, is directed toward "controll[ing] coal mining's present and future environmental harms." *United States v. Tri-No Enters., Inc.*, 819 F.2d 154, 157 (7th Cir.1987) (noting that "Title V imposes an obligation on operators of surface coal mining operations to control the environmental harm their operations may cause"). On the other hand, Title IV, 30 U.S.C. §§ 1231-43, harbors the reclamation fee provisions and targets abandoned as well as unreclaimed mines. *Id.* (explaining that Title IV was intended to "correct the environmental harm caused by past coal mining").

Congress determined that the burden for paying for the restoration of mining lands should be borne by the coal industry and, in turn, the consumers of coal. H.R. REP. NO. 218, at 136 (1997), reprinted in 1977 U.S.C.C.A.N. 593, 668. In order to accomplish this goal, Congress established the Abandoned Mine Reclamation Fund (Fund), a trust fund used for the

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[1] The facts were discussed in detail in the court's opinion granting defendant's motion to dismiss, *Consolidation Coal Co., et al. v. United States*, 54 Fed.Cl. 14, 15-16 (2002), and in the Federal Circuit's decision, *Consolidation Coal Co., et al. v. United States*, 351 F.3d 1374, 1376-77 (Fed.Cir.2003). The undisputed factual assertions are repeated herein and supplemented where necessary to provide factual information pertinent to this opinion.

purpose of restoring various natural resources that had been damaged due to mining. 30 U.S.C. § 1231(a), (c) & (d). The Fund primarily derives revenue from an exaction imposed upon "coal produced." *Id.* § 1232(a); 30 C.F.R. § 870.12(a).

Specifically, the SMCRA provides, in pertinent part:

> All operators of coal mining operations subject to the provisions of this chapter shall pay to the Secretary of the Interior, for deposit in the fund, a reclamation fee of 35 cents per ton of coal produced by surface coal mining and 15 cents per ton of coal produced by underground mining or 10 per centum of the value of the coal at the mine, as determined by the Secretary, whichever is less, except that the reclamation fee for lignite coal shall be at a rate of 2 per centum of the value of the coal at the mine, or 10 cents per ton, whichever is less.

30 U.S.C. § 1232(a). The level of the fee reflected a compromise between several principal considerations: balancing the burden on the industry against the inflationary impact on the economy. H.R. REP. NO. 218, at 137, reprinted in 1977 U.S.C.C.A.N. 593, 669. It was to be set at a level which would not "'constrain the development or production' of coal," but at the same time would "generate sufficient revenue to fund the Abandoned Mine Program." *Drummond Coal Co. v. Hodel*, 610 F.Supp. 1489, 1499 (D.D.C.1985) (citing H.R. REP. NO. 218, at 136 (1997), reprinted in 1977

U.S.C.C.A.N. 593, 668). The Fund's unappropriated balance is approximately $2 billion.

The Secretary of the Interior (Secretary) was given ultimate authority to "publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of [the Act]." 30 U.S.C. § 1211(c)(2). The extent of the Secretary's broad authority is illuminated in 30 U.S.C. § 1242(a), which empowers the Secretary "to engage in any work and to do all things necessary or expedient, including promulgation of rules and regulations, to implement and administer the provisions of this subchapter." In other words, the Secretary possessed the authority to enforce the SMCRA as well as to fill-in any gaps through rules and regulations.

Consistent with the SMCRA's mandate, the Secretary subsequently promulgated implementing regulations. The reclamation fee is to be paid "on each ton of coal produced for sale, transfer, or use ...." 30 C.F.R. § 870.12(a). The fee is "determined by the weight and value at the time of initial bona fide sale, transfer of ownership, or use by the operator." *Id.* § 870.12(b). Further, "[t]he weight of each ton shall be determined by the actual gross weight of the coal." *Id.* § 870.12(b)(3). The regulations also indicate the extent to which weight deductions are permissible: "Impurities that have not been removed prior to the time of initial bona fide sale, transfer of ownership, or use by the operator, excluding excess moisture for which a reduction has been taken pursuant to § 870.18, shall not be deducted from the gross weight." *Id.* § 870.12(b)(3)(i).

Certain record-keeping requirements were incorporated into the regulatory framework. Coal producers "selling coal on a clean coal basis [were required to] retain records that show run-of-mine tonnage, and the basis for the clean coal transaction." *Id.* § 870.12(b)(3)(ii). Failure to maintain sufficient records "subject[ed] the operator to fees based on raw tonnage data." *Id.* § 870.12(b)(3)(iii). In addition, the regulations mandated that:

(a) Any person engaging in or conducting a surface coal mining operation shall maintain, on a current basis, records that contain at least the following information:

(1) Tons of coal produced, bought, sold or transferred, amount received per ton, name of person to whom sold or transferred, and the date of each sale or transfer.

(2) Tons of coal used by the operator and date of consumption.

(3) Tons of coal stockpiled or inventoried which are not classified as sold for fee computation purposes under § 870.12.

30 C.F.R. § 870.16(a)(1)-(a)(3).

In accordance with the SMCRA and implementing regulations, plaintiffs paid reclamation fees on coal which was sold to foreign customers. On April 27, 2001, Consolidation Coal Company brought suit in this court alleging that the reclamation fee

violated the Takings Clause and the Export Clause.[2] Rapoca Energy Company filed its complaint on July 31, 2001, relying upon the same constitutional provisions as Consolidation Coal Company. The two cases were consolidated on November 6, 2001.

Following extensive briefing, the court dismissed plaintiffs' complaint on August 14, 2002, for lack of subject matter jurisdiction. The court first reasoned that plaintiffs' constitutional claims were subject to statute of limitations constraints. *Consolidation Coal Co., et al. v. United States*, 54 Fed.Cl. 14, 17 (2002). Next, relying on *Amerikohl Mining, Inc. v. United States*, 899 F.2d 1210 (Fed.Cir.1990) and 30 U.S.C. § 1276(a)(1), the court concluded that jurisdiction over plaintiffs' challenge rested exclusively with the United States District Court for the District of Columbia (D.C. District Court) because plaintiffs were challenging the substance of the regulations. *Consolidation Coal*, 54 Fed.Cl. at 19. Plaintiffs appealed the court's decision to the Federal Circuit. On December 11, 2003, the Federal Circuit held that the Export Clause provided an independent self-executing cause of action within the court's jurisdiction and that Congress did not unambiguously withdraw Tucker Act jurisdiction in

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[2] On February 14, 2005, plaintiffs represented at oral argument, in response to an inquiry from the court, that they were no longer pursuing their Takings claim in this action. Transcript of Oral Argument (Tr.) at 6; see also Plaintiffs' Motion For Summary Judgment (Plaintiffs' Mot.) at 2 n. 2; Plaintiffs' Reply Brief In Support Of Their Motion For Summary Judgment And Response To Defendant's Renewed Motion To Dismiss Plaintiffs' Claims at 4 n. 1.

30 U.S.C. § 1276(a)(1). *Consolidation Coal Co., et al. v. United States,* 351 F.3d 1374, 1376-77 (Fed.Cir.2003). The case was, therefore, remanded to the court for further proceedings.

On May 21, 2004, plaintiffs filed their Motion For Summary Judgment. On July 9, 2004, defendant responded by opposing plaintiffs' motion and by renewing its motion to dismiss for failure to state a claim upon which relief can be granted. Plaintiffs filed their response and reply on September 17, 2004. Subsequently, on September 30, 2004, plaintiffs filed a supplemental brief discussing proposed new rules pertaining to the reclamation fee. Defendant replied on December 2, 2004. The court heard oral argument on February 14, 2005.

Discussion

Plaintiffs have moved for summary judgment contending that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. RCFC 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Jay v. Sec'y, DHHS,* 998 F.2d 979, 982 (Fed.Cir.1993). A fact is material if it might significantly affect the outcome of the suit under the governing law. Anderson, 477 U.S. at 248. The party moving for summary judgment bears the initial burden of demonstrating the absence of any genuine issues of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986). If the moving party demonstrates an absence of a genuine issue of material fact, the burden then shifts to the non-moving party to show that a genuine issue exists. *Sweats Fashions, Inc. v. Pannill Knitting Co., Inc.,* 833

F.2d 1560, 1563 (Fed.Cir.1987). Alternatively, if the moving party can show there is an absence of evidence to support the non-moving party's case, then the burden shifts to the non-moving party to proffer such evidence. Celotex, 477 U.S. at 325. The court must resolve any doubts about factual issues in favor of the party opposing summary judgment, *Litton Indus. Prods., Inc. v. Solid State Sys. Corp.*, 755 F.2d 158, 163 (Fed.Cir.1985), to whom the benefits of all favorable inferences and presumptions run. *H.F. Allen Orchards v. United States*, 749 F.2d 1571, 1574 (Fed.Cir.1984).

Defendant opposes plaintiffs' summary judgment motion by renewing its motion to dismiss for failure to state a claim upon which relief can be granted.[3] The court will grant a RCFC 12(b)(6) motion only if it appears beyond a doubt that plaintiffs have failed to allege facts sufficient to support their claim. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Mostowy v. United States*, 966 F.2d 668, 672 (Fed.Cir.1992). In ruling on a RCFC 12(b)(6) motion to dismiss, the court must accept as true the complaint's undisputed factual allegations and should construe them in a light most favorable to plaintiffs. *Papasan v. Allain*, 478 U.S. 265, 283 (1986) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 2363 (1974); *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed.Cir.1991)). Nevertheless, "conclusory allegations unsupported by any factual assertions will not withstand a motion to dismiss."

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[3] The Federal Circuit expressly indicated that its opinion did not encompass defendant's motion to dismiss for failure to state a claim. *Consolidation Coal*, 351 F.3d at 1377 n. 3.

Briscoe v. LaHue, 663 F.2d 713, 723 (7th Cir.1981), *aff'd,* 460 U.S. 325 (1983). "[L]egal conclusions, deductions, or opinions couched as factual allegations are not given a presumption of truthfulness." *Blaze Constr., Inc. v. United States,* 27 Fed.Cl. 646, 650 (1993) (internal quotations omitted).

The Export Clause of the United States Constitution unequivocally provides that "[n]o Tax or Duty shall be laid on articles exported from any state."[4] This constitutional proscription has consistently been afforded a broad construction to "prohibit[ ] Congress from laying any tax or duty on exports." *United States v. IBM,* 517 U.S. 843, 852 (1996); *United States v. United States Shoe Corp.,* 523 U.S. 360, 367 (1998) (interpreting *IBM* to stand for the proposition that "the Export Clause allows no room for any federal tax, however generally applicable or nondiscriminatory, on goods in export transit"); *Fairbank v. United States,* 181 U.S. 283, 290 (1901) ("The requirement of the Constitution is that exports should be free from any government burden."); *Ranger Fuel Corp. v. United States,* 33 F.Supp.2d 466, 469 (E.D.Va.1998) (acknowledging the Export Clause's "blanket prohibition"). The United States Supreme Court (Supreme Court) in *U.S. Shoe* noted the true reach of the Export Clause's prohibition: "*IBM* plainly stated that the Export Clause's simple, direct, unqualified prohibition on any taxes or duties distinguishes it from other constitutional limitations on governmental taxing authority." *U.S. Shoe,* 523 U.S. at 368.

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[4] U.S. CONST. art. I, § 9, cl. 5.

The Export Clause's breadth also finds support in debates during the Constitutional Convention of 1787. For instance, an amendment was proposed which would have inserted the phrase "for the purpose of revenue" after the word "duty." Such an amendment would have curtailed the clause's reach, however, it was defeated by a count of eight to three. *Pace v. Burgess,* 92 U.S. 372, 372 (1875) (citing Madison Debates, p. 456); see also *IBM,* 517 U.S. at 859-60; *Fairbank,* 181 U.S. at 292-93. In addition, the delegates rejected an amendment which would have allowed taxation of exports contingent upon approval by two-thirds of both houses. *United States Shoe Corp. v. United States,* 907 F.Supp. 408, 19 C.I.T. 1284, 1288-89 (1995) (citing Note, *Constitutionality of Export Controls,* 76 YALE L.J. 200, 203 (1966)).[5] Although the government has on numerous occasions urged the Supreme Court to adopt a narrow interpretation of the Framers' original intent, the government's argument to that effect in *IBM* was explicitly rejected. The Supreme Court explained that "[t]he better reading [of the Framers' intent], that adopted by our earlier cases, is that the Framers sought to alleviate their concerns by completely denying to Congress the power to tax exports at all." IBM, 517 U.S. at 861.

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[5] See also Claire R. Kelly & Daniela Amzel, *Does the Commerce Clause Eclipse the Export Clause?: Making Sense of United States v. United States Shoe Corp.,* 84 MINN. L. REV. 129, 143-44 (Nov.1999); Erik A. Jensen, *The Export Clause,* 6 FLA. TAX REV. 1, 6-15 (2003).

The Export Clause's prohibition extends beyond the direct taxation of articles in export to "services and activities closely related to the export process." *Id.* at 846. For example, the Supreme Court has held that a tax on a foreign bill of lading was in substance a tax on the articles themselves. *Fairbank*, 181 U.S. at 293. The same analysis was applied to a tax on ship charters in *United States v. Hvoslef*, 237 U.S. 1, 17 (1915). Further, in both *Thames* and *IBM*, the Supreme Court held that a tax on insurance premiums violated the Export Clause. *Thames & Mersey Marine Ins. Co. v. United States*, 237 U.S. 19, 27 (1915); *IBM*, 517 U.S. at 862. The Supreme Court also held, albeit under an Import-Export Clause analysis, that requiring an importer to obtain a license was a tax on imports. *Brown v. Maryland*, 12 Wheat. 419, 25 U.S. 419, 4448 (1827).

Most important to the inquiry at hand, however, are the court holdings recognizing that a tax on the sale of an article is the equivalent to a tax on the article; provided, of course, the sale occurs in the export process. In *A.G. Spalding & Bros. v. Edwards*, a tax on the sale of baseball products was invalidated where "the sale was a step in exportation ...." *A.G. Spalding & Bros. v. Edwards*, 262 U.S. 66, 68 (1923); see also *Willcuts v. Bunn*, 282 U.S. 216, 228 (1931) ("A tax on the sale of an article, imported only for sale, is a tax on the article itself.") (citing *Brown*, 25 U.S. at 444). Likewise, in *Ranger Fuel*, a tax on the sale of coal which was used to finance the Black Lung Disability Trust Fund was deemed to be a violation of the Export Clause. *Ranger Fuel*, 33 F.Supp.2d at 469. Therefore, a tax on the sale of an article does not fall

into the category of "various services and activities only tangentially related to the export process" which could permissibly be taxed. *IBM*, 517 U.S. at 850.

Despite the Export Clause's broad reach, several well-defined exceptions have been carved out. The first such exception was articulated in *Cornell v. Coyne*, which upheld a tax on the manufacture of filled cheese bound for export. *Cornell v. Coyne*, 192 U.S. 418, 427 (1904). The Supreme Court provided the following rationale in support thereof:

> The true construction of the constitutional provision is that no burden by way of tax or duty can be cast upon the exportation of articles, and does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated. The exemption attaches to the export, and not to the article before its exportation.

Id. Approximately two decades before *Cornell*, this exception was discussed in *Turpin v. Burgess*, 117 U.S. 504 (1886). *Turpin* involved the same stamp tax on tobacco bound for export as was discussed in *Pace v. Burgess*, 92 U.S. 372 (1875). In *Turpin*, the stamp tax was left undisturbed because "the tax (if it was a tax) was laid upon the goods before they had left the factory. They were not in course of exportation ...." *Turpin*, 117 U.S. at 507.

The second exception involves the so-called user fee. In *U.S. Shoe*, the Supreme Court applied the "time-tested decision in *Pace*" in determining what

constitutes a user fee. *U.S. Shoe*, 523 U.S. at 369. The Supreme Court explained that the Export Clause "does not rule out a 'user fee,' provided that the fee lacks the attributes of a generally applicable tax or duty and is, instead, a charge designed as compensation for Government-supplied services, facilities, or benefits." *Id.* at 363 (citing *Pace*, 92 U.S. at 375-76). Distinguishing between a duty and "compensation given for services [in fact] rendered," the Supreme Court defined a valid user fee as one that "correlate[s] reliably with the ... services used or usable by the exporter," *id.*, or "fairly match[es] the exporters' use of ... services and facilities." *Id.* at 370. Accordingly, a user fee properly calibrated to account for services rendered could survive Export Clause scrutiny.

Acts of Congress are entitled to a presumption of constitutionality. *Fairbanks*, 181 U.S. at 283; *Moon v. Freeman*, 379 F.2d 382, 391 (9th Cir.1967). The burden of demonstrating that a statute is unconstitutional falls on the party challenging its validity. *Moon*, 379 F.2d at 391. In the Export Clause context, a tax is to be afforded its "common [ ] and usually expansive [ ] meaning ...." *IBM*, 517 U.S. at 858 (footnote omitted). The Supreme Court has also instructed that the inquiry should "regard things rather than names," *Fairbank*, 181 U.S. at 304, and that it is the court's task "to guard against ... the imposition of a[tax] under the pretext of fixing a fee." *U.S. Shoe*, 523 U.S. at 370 (quoting *Pace*, 92 U.S. at 376). With these factors in mind, the court turns to the merits of the case.

At this juncture, two preliminary observations

which narrow the scope of the court's inquiry are warranted. First, defendant expressly disavowed any reliance on the argument that the reclamation fee constitutes a user fee.[6] Second, defendant concedes that the sale of coal occurs in the export process.[7] Despite these concessions, several key issues still remain unresolved. The court must initially discern the precise moment the reclamation fee is imposed. Both sides agree that the fee would be constitutional if imposed solely on extraction, which would be the equivalent of the manufacturing stage in *Cornell,* 192 U.S. at 427. On the other hand, given defendant's concession that the sale occurs in the export process, the fee, if held to be a tax, would be unconstitutional pursuant to *A.G. Spalding* if imposed at the time the coal is sold. *A.G. Spalding,* 262 U.S. at 68. Next, assuming the fee is imposed at the time of sale, the court's analysis shifts and descends into an assessment of the relationship between Export Clause and Commerce Clause jurisprudence. The court must address whether the Commerce Clause overrides the Export Clause and, if so, whether the reclamation fee is a permissible exercise of Congress' Commerce Clause power.

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[6] Defendant's Reply Memorandum In Support Of Its Renewed Motion To Dismiss Plaintiffs' Claims And In Opposition To Plaintiffs' Motion For Summary Judgment at 6; see also Tr. at 22.

[7] Compare Plaintiffs' Proposed Findings Of Uncontroverted Fact ¶ 24 with Defendant's Responses And Objections To Plaintiffs' Renewed Proposed Findings Of Uncontroverted Fact ¶ 24; see also Defendant's Renewed Motion To Dismiss Plaintiffs' Claims And Opposition To Plaintiffs' Motion For Summary Judgment (Def.'s Mot.) at 30 n. 10.

I. *When is the reclamation fee imposed?*

Defendant maintains that while the fee may be calculated at the time of the sale, it is actually based on "coal produced" at the mine. Stated another way, defendant contends that the reclamation fee is assessed on the amount of coal extracted from the ground. Defendant avers that if Congress intended to impose a sales tax it could have employed the same language (i.e., coal sold) it used in the Black Lung Excise Tax.[8] In addition, defendant asserts that the reclamation fee is analogous to the tax on the manufacture of filled cheese upheld in *Cornell*, 192 U.S. at 427. Defendant avers, on the basis of *Cornell* and its progeny, that the production of an item is separate and distinct from its sale. Defendant also relies on SMCRA record-keeping regulations to support its position. Further, defendant advances a separation of powers argument. Defendant also maintains that plaintiffs' argument is premised on the regulations promulgated by the Secretary and not on the SMCRA's statutory language. In sum, defendant maintains that "nothing suggests that the activities occurring at the time the fee is calculated should be understood as creating the underlying liability for that fee."[9]

Plaintiffs contend that the reclamation fee is imposed at the time of sale and is calculated on the amount of coal sold. Plaintiffs aver, however, that the reclamation fee is not a sales tax per se; rather, they

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[8] 26 U.S.C. § 4121.

[9] Def.'s Mot. at 22.

advocate a subtle distinction that the reclamation fee is a tax which burdens the sale of coal. Plaintiffs maintain that the reclamation fee is not based on the amount of coal extracted because an obligation to pay the fee does not arise until the coal is sold. Plaintiffs assert that they could stockpile coal indefinitely without incurring any liability to pay the reclamation fee. Further, plaintiffs rely heavily on the *Drummond Coal* decisions to support their position. Plaintiffs also argue that the record-keeping regulations merely serve a "control function" and do not establish that the reclamation fee is based on the amount of coal extracted. Plaintiffs aver that no separation of powers issue is present in this case.

At the outset, defendant argues that "the statute says coal produced ... [a]nd coal produced is clearly distinguishable from a sales tax. Congress knows how to do a sales tax. It did it in the Black Lung Excise Tax ... [a]nd we think the case really ... should be that straightfoward."[10] While defendant's argument is superficially appealing, the problem with that argument is that Congress also knows how to use the term "extraction." In fact, it did so in the Black Lung Excise Tax, the very statutory provision relied upon by defendant. 26 U.S.C. § 4121(d)(1) (memorializing the phrases "[c]oal extracted" and "coal is extracted"). Accordingly, the court does not find the linguistic differences between the SMCRA and the Black Lung Excise Tax controlling and returns to the term "coal produced."

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[10] Tr. at 53.

Both parties agree that the reclamation fee is imposed upon the amount of "coal produced" as described in 30 U.S.C. § 1232(a). Defendant maintains that "[a]lthough the statute does not define 'produc[tion]' in a separate provision, no such definition is necessary, as it is clear from SMCRA's purpose and legislative history, as well as from common sense, what 'produc[tion]' means in this context."[11] Defendant's statement is only partially accurate. Defendant's proposition is correct only to the extent it recognizes that the term "coal produced" was not specifically defined in the statute. *Drummond Coal Co. v. Hodel*, 796 F.2d 503, 507 (D.C.Cir.1986) (explaining that "Congress did not explicitly address the proper meaning of the words 'coal produced' in either the statutory language or the legislative history"). The remainder of defendant's position is directly contradicted by the *Drummond Coal* decisions.

In *Drummond Coal*, the Secretary promulgated regulations which taxed impurities in the coal which had not been removed prior to sale. *Drummond Coal*, 610 F.Supp. at 1493 (quoting 30 C.F.R. § 870.12(b)(3)(i) (1982)). The plaintiff in *Drummond Coal* alleged that the Secretary did not possess the authority to tax excess moisture which accumulated on the coal after it was extracted from the ground. *Id.* To ascertain the limits of the Secretary's authority, the D.C. District Court was required to interpret the

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[11] Def.'s Mot. at 18.

phrase "coal produced;" the same term at issue in this case. The D.C. District Court undertook an extensive analysis of the term:

> 30 U.S.C. § 1232 states that a reclamation fee of 35 cents per ton of "coal *produced* by surface coal mining" shall be levied on all coal operators. Emphasis added. The term "produced" is ambiguous. "Production" could reasonably be interpreted to include the entire process of extracting and selling coal, complete from pit to buyer's door, or it could refer solely to the process of extraction. The latter interpretation would support the conclusion that impurities added after extraction, such as moisture, should not be taxed. The former interpretation would imply that the gross product sold to the buyer- even if it contains impurities and moisture- should serve as the basis for taxation.

Id. at 1497. After concluding that the term "coal produced" was ambiguous, the D.C. District Court held that "[t]he 1982 revised regulations adopt the first of the two possible interpretations of section 1232." *Id.* at 1498. Accordingly, the D.C. District Court declined to equate the term "coal produc [tion]" with extraction and upheld the regulations.

Subsequently, the plaintiff appealed to the United States Court of Appeals for the District of Columbia (D.C.Circuit) and again advanced a "plain meaning" argument to support his position. *Drummond Coal,* 796 F.2d at 505. The D.C. Circuit, for all practical purposes, adopted the D.C. District Court's reasoning

and rejected the plaintiff's argument:

> Congress ... did not define "coal" in the statute- still less the term "coal produced," upon which the fee is levied. Like the district court, we do not find the ordinary meaning of that term unambiguous: " 'Production' could reasonably be interpreted to include the entire process of extracting and selling coal, complete from pit to buyer's door, or it could refer solely to the process of extraction .... [N]owhere does the [SMCRA] specify what elements compromise a 'taxable' piece of coal.

Id. (quoting 610 F.Supp. at 1497). The D.C. Circuit concluded its opinion as follows: "We do not say that the Secretary is or was forbidden to adopt Drummond's suggested definition of 'coal produced.' Rather, we hold that because Congress had no specific intention on this point, the Secretary, under *Chevron,* had the authority to fashion a reasonable interpretation. This the Secretary has done." *Id.* at 508. Therefore, the D.C. Circuit deferred to the Secretary's interpretation and upheld his authority to include excess moisture which was not present at the time of extraction in the reclamation fee calculation.

The decisions in *Drummond Coal* are significant in several respects. First, the decisions undermine defendant's argument that the term "coal produced" is unambiguous in light of the SMCRA's "legislative history" and "common sense." *Drummond Coal,* 796 F.2d at 505, 507. Second, the decisions conflict with defendant's assertion that "coal produc[tion]" is limited to extraction. Defendant attempts to evade

this second conclusion by arguing that the D.C. Circuit did not adopt the D.C. District Court's holding that "production" "include[s] the entire process of extracting and selling coal, complete from pit to buyer's door ...." *Id.* at 505 (quoting 610 F.Supp. at 1497). Defendant is mistaken. The D.C. Circuit, in its *Chevron* analysis, concluded that the Secretary had the authority to fashion, and did fashion, a reasonable interpretation of the SMCRA. *Id.* at 508. The reasonable interpretation referenced and endorsed in the D.C. Circuit's opinion was the District Court's conclusion that "[t]he 1982 revised regulations adopt the first of the two possible interpretations of section 1232." *Drummond Coal*, 610 F.Supp. at 1492.

Third, the *Drummond Coal* decisions also implicitly refute defendant's argument that production is limited to extraction. If, as defendant argues, coal production included only extraction, the Secretary would not have had the power to include excess moisture in the reclamation fee calculation.[12] The Secretary's authority would have ceased at extraction and could not have extended beyond that point to include excess moisture which accumulated after the extraction process ended.[13] In other words,

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[12] Excess moisture is by definition moisture which accumulates after coal is extracted from the ground. Drummond Coal, 796 F.2d at 504 n. 2.

[13] Notably, at the time of the *Drummond Coal* decisions, taxation would not have been limited to excess moisture. Oil treatment, antifreeze, and post-extraction debris would also have been included in the reclamation fee calculation. Tr. at 76.

Drummond Coal would have been decided differently had the court adopted the position that production was synonymous with extraction. In rejecting the plaintiff's argument, the D.C. Circuit allowed excess moisture to be included in the calculation because the Secretary's authority transcended the extraction process and extended "from pit to buyer's door." *Drummond Coal,* 796 F.2d at 505 (quoting 610 F.Supp. at 1497). Accordingly, the court concludes that the term "coal produced" is not confined to extraction.

The court next turns to examine the exact time at which the reclamation fee is imposed. Plaintiffs maintain that the reclamation fee is imposed at the time the coal is sold. Defendant, on the other hand, contends that the fee is only calculated at the time of sale. The court agrees with plaintiffs. As an initial matter, the *Drummond Coal* decisions touch upon this aspect of the analysis. As mentioned above, both parties agree that the reclamation fee is imposed upon "coal produced." Having concluded that the term "coal produced" encompasses "the entire process of extracting and selling coal, complete from pit to buyer's door," *id.* (quoting 610 F.Supp. at 1497), the reclamation fee necessarily burdens the sale of coal. Nevertheless, the court proceeds with the analysis to pinpoint the reclamation fee's imposition.

A coal producer is permitted to stockpile coal without incurring any obligation to pay the reclamation fee. In *Consolidation Coal,* the government acknowledged that it "does not now claim, and never has claimed, that an operator which mines coal ... and places that coal in a coal stockpile

prior to sale, should pay a reclamation fee ... on that coal." *United States v. Consolidation Coal Co.*, No. 82-1077, slip op. at 3 (S.D.W.Va. Nov. 7, 1985). While defendant criticizes plaintiffs' "stockpiling" argument as "hypothetical[ ]" whereas "Interior's regulations ... are based on real-world situations,"[14] plaintiffs' argument is not as far-fetched as defendant suggests.

In *United States v. Tri-No Enters., Inc.*, 819 F.2d 154, 157 (7th Cir.1987), the plaintiff sold coal which was retrieved from stockpiles on his land. *Tri-No*, 819 F.2d at 156. The government attempted to collect the reclamation fee, but the plaintiff refused to pay. *Id.* The plaintiff argued that assessing a reclamation fee on coal removed from stockpiles removed any incentive to eliminate stockpiles and could lead to additional environmental harm. *Id.* at 157. Although the United States Court of Appeals for the Seventh Circuit (Seventh Circuit) found the plaintiff liable, it noted the following: "Arguably, Title IV's language may defeat Congress' purpose by reducing or eliminating the economic incentive to remove otherwise abandoned (and possibly environmentally harmful) stockpiles. If so, Congress, not this court, will determine if the statute needs adjustment." *Id.* In other words, the Seventh Circuit acknowledged the legitimacy of plaintiffs' position that the reclamation fee does not attach to stockpiled coal.

The above analysis, therefore, begs the question-when is the reclamation fee imposed? Several courts

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[14] Def.'s Mot. at 27 n.9.

have touched upon the issue; although their holdings are not binding on the court, it does find their reasoning persuasive. The United States District Court for the Northern District of West Virginia addressed a coal producer's "legitimate concerns about the possibility of having the reclamation fee twice imposed upon the coal recovered from the gob piles." *United States v. Spring Ridge Coal Co.*, 793 F.Supp. 124, 127 (N.D.W.Va.1992). Stated another way, the coal producer argued that a reclamation fee may already have been paid on the coal in the gob pile. The District Court did not accept the coal producer's position because "coal from the gob piles would not be assessed a reclamation fee until it had been cleaned, processed, and sold." *Id.* Thus, the possibility of double-billing was minimized because the fee was not assessed until the coal was sold.

In *Consolidation Coal,* the United States Court of Appeals for the Fourth Circuit (Fourth Circuit) interpreted the SMCRA in a similar manner by affirming the District Court's interpretation of "the [SMCRA] as imposing a reclamation fee on 'those *who* gain an economic benefit from the coal *when* they gain the advantage.' " *United States v. Consolidation Coal Co.*, 1987 WL 36307, at *1 (4th Cir.1987) (unpublished opinion). The Fourth Circuit elaborated: "[t]he critical date for application of the [SMCRA] is therefore not the date on which the coal was originally extracted from the ground, but the date on which the economic advantage is gained." *Id.* The Fourth Circuit upheld the District Court's conclusion that the coal producer had "derived the economic advantage when it sold the coal ...." *Id.* Therefore, the

Fourth Circuit's decision in *Consolidation Coal* corroborates the conclusion reached in *Spring Ridge Coal* that the reclamation fee is imposed at the time the coal is sold.

In sum, the reclamation fee does not fit into the *Cornell* mold, but rather is analogous to *A.G. Spalding* and *Ranger Fuel,* as it is imposed upon the sale of coal and burdens that event. The term "coal produced" extends beyond mere extraction and includes "the entire process of extracting and selling coal, complete from pit to buyer's door." *Drummond Coal,* 796 F.2d at 505 (quoting 610 F.Supp. at 1497). No obligation to pay the reclamation fee comes into existence until the coal is sold. The SMCRA has been interpreted as "impos[ing]" or "assess[ing]" the reclamation fee at the time the coal is sold. *Spring Ridge Coal,* 793 F.Supp. at 127; *Consolidation Coal,* 1987 WL 36307, at *1. The court's task, however, is far from over. Given that defendant does not dispute that the sale of coal takes place at a point in time when the coal is already in the stream of export, and that the case law has equated a tax on the sale of an item with a tax on the actual item itself, the court must ascertain the reclamation fee's operative character. Defendant argues that despite the timing of the reclamation fee's imposition, it should nevertheless be upheld as a valid exercise of Congress' Commerce Clause power.

II. *Commerce Clause v. Export Clause*

The first issue the court must resolve is whether the Supreme Court in *Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.,* 452 U.S. 264

(1981) upheld the SMCRA's enactment as a constitutional exercise of Congress' Commerce Clause power.[15] Defendant asserts *Hodel* is binding precedent which conclusively established that the SMCRA, in its entirety, is constitutional. Defendant contends that the Supreme Court's conclusion in *Hodel* was premised on Congress' findings in Title I of the SMCRA, which concluded that coal mining operations adversely affect interstate commerce. Defendant maintains that Congress' findings indiscriminately apply to the entire Act. A close examination of both the District Court's and the Supreme Court's opinion, however, reveals that the Supreme Court's opinion did not encompass Title IV of the SMCRA.

At an initial glance, the question presented in *Hodel* was whether the SMCRA's enactment was a valid exercise of Congress' Commerce Clause power. Hodel, 452 U.S. at 268. After reviewing Congress' findings, the Supreme Court determined that "Congress rationally determined that regulation of surface coal mining is necessary to protect interstate commerce from adverse effects that may result from that activity." *Id.* at 281. In a footnote, however, the Supreme Court acknowledged that the District Court's decision to deny declaratory relief as to Title IV had not been appealed. *Id.* at 273 n. 9. Stated

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[15] The Commerce Clause provides "Congress shall have Power ... [t]o regulate commerce with foreign nations, and among the several States, and with the Indian tribes." U.S. CONST. art. I, § 8, cl. 3.

another way, the constitutionality of Title IV was not an issue which was before the Supreme Court and any decision as to Title IV would have transcended the proper scope of the appeal.

Defendant also cannot find any solace in the District Court's opinion, the text of which makes clear that the basis for denying declaratory relief regarding Title IV was not an endorsement of constitutionality. The District Court explained that "the thrust of [the plaintiffs'] challenge has been directed particularly to the constitutionality of Title V of the act ...." *Virginia Surface Mining and Reclamation Ass'n, Inc., v. Andrus,* 483 F.Supp. 425, 429 (W.D.Va.1980). The District Court further elaborated:

> Very little, if any, challenge has been mounted to the provisions for abandoned mine reclamation. The issues involved in plaintiffs' challenge to Title V, although similar in certain respects, are clearly separable from the issues involved in plaintiffs' challenge to Title IV. Likewise, the provisions of each title are such that constitutional questions regarding one do not of necessity implicate the other.

Id. The District Court noted that the individual provisions were severable and that it possessed the authority "to deny declaratory relief as to any matter which the court finds not to be clearly articulated." *Id.* The District Court concluded that declaratory relief should be denied because "questions concerning Title V of the act [are] capable of resolution without regard to Title IV, and ... challenges to the latter [are]

less than clearly presented ...." *Id.* One must ponder whether the District Court would have taken the great pains it did to bifurcate its analysis of Title V from Title IV if the analysis of the former simply subsumed the analysis of the latter. Accordingly, the constitutionality of Title IV was not a matter which was addressed in either the District Court's or the Supreme Court's opinion.[16]

The parties next dispute whether legislation purportedly enacted under Congress' Commerce Clause power should be subjected in appropriate circumstances to an Export Clause analysis. Not surprisingly, the parties adopt diametrically opposed and extreme positions. Defendant avers that the Export Clause is not as absolute as plaintiffs read it. Defendant maintains that regulatory legislation under the Commerce Clause is "immune from scrutiny under the Export Clause."[17] Defendant contends that the imposition of a fee on exports should be upheld against an Export Clause challenge provided the fee is part of a regulatory scheme. Plaintiffs, on the other hand, contend that the Export Clause prohibits any burden irrespective of whether it is intended to regulate commerce or raise revenue. Plaintiffs, therefore, assert that a Commerce Clause analysis is unnecessary. Stated another way, plaintiffs aver that the Commerce Clause can never

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[16] As will be discussed in greater detail below, the court need not decide which constitutional provision Congress purportedly relied upon in enacting the reclamation fee.

[17] Def.'s Mot. at 8.

override the Export Clause.

There is a colorable indication that the Supreme Court would protect the export process from infringement by either any regulatory or revenue raising measure. In *North American Co.*, the Supreme Court explained that Congress' Commerce Clause power "is limited by express provisions in other parts of the Constitution, such as Section 9 of Article I ...." *North American Co. v. SEC*, 327 U.S. 686, 704-05 (1946). This statement translates into the proposition that the Commerce Clause is limited by the Export Clause's prohibition. More importantly, in *IBM*, the Supreme Court did not recognize a distinction between regulatory and revenue raising legislation in the export context. *IBM*, 517 U.S. at 860. Specifically, the Supreme Court explained that the Export Clause "prohibits Congress from *regulating* international commerce through export taxes [and] disallows any attempt to raise federal revenue from exports ...." *Id.* at 859 (emphasis added). Thus, support exists for the position that the Export Clause's prohibition does not distinguish between regulatory and revenue raising measures.

On the other hand, the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) and the Federal Circuit both declined to forego a Commerce Clause analysis simply because the Export Clause was implicated. In *Moon v. Freeman*, the Ninth Circuit confronted the issue head-on and rejected an argument that the Export Clause is "an across-the-board limitation on the commerce power as well as the taxing power ...." *Moon v. Freeman*, 379 F.2d 382, 390 (9th Cir.1967). The Ninth Circuit explained that

the inquiry should focus on whether the primary purpose of the legislation was to raise revenue or to regulate commerce, and whether revenue was only incidentally raised. *Id.* at 391. Further, in *U.S. Shoe*, the Federal Circuit likewise examined whether an economic burden on exports could be upheld under the Commerce Clause. *United States Shoe Corp. v. United States*, 114 F.3d 1564, 1575-77 (Fed.Cir.1997). Although the Federal Circuit ultimately invalidated the Harbor Maintenance Tax (HMT), it first analyzed whether the economic burden itself was regulatory in nature. *Id.* at 1576-77. Accordingly, both *Moon* and *U.S. Shoe* stand for the proposition that in the export context the court should not simply invalidate the legislation, but should examine its character.

The court, however, need not conclusively resolve the tensions between the Export Clause and the Commerce Clause in the export context because plaintiffs prevail irrespective of which interpretation the court adopts. First, pursuant to *IBM*, Congress appears to lack the authority either to "regulat[e] international commerce through export taxes" or to enact legislation which "attempt[s] to raise federal revenue from exports ...." *IBM*, 517 U.S. at 859. In this regard, it would make no difference whether the reclamation fee is a regulation which infringes on exported coal or is directed toward raising revenue. The court would have no option but to strike down the reclamation fee as an unconstitutional economic burden on exportation.

Conversely, under *U.S. Shoe* and *Moon*, the court is required to undertake a more in-depth analysis. Plaintiffs first direct the court's attention to case law

which has found that the reclamation fee is a tax. Next, plaintiffs assert that the primary purpose of the reclamation fee is to raise revenue, which is placed in a trust fund, for the reclamation of abandoned mines. Plaintiffs aver that the reclamation fee has no regulatory purpose and, therefore, this case is analogous to *U.S. Shoe*. Plaintiffs maintain that their position is buttressed by the fact that the funds are "on budget" and are used to fund other government programs. Plaintiffs also contend that $500 million has been used to pay for health care benefits for coal industry retirees and dependents. Further, plaintiffs assert that an enormous surplus has accumulated over the years.

Defendant cites to various sections of the SMCRA's Congressional findings to support its argument that the Act as a whole was enacted to regulate interstate commerce. See 30 U.S.C. § 1201(c), (g), (j). Defendant maintains that the presence of Congressional findings distinguish this case from *U.S. Shoe*. Defendant contends, in an argument which the court has already rejected, that the Supreme Court in *Hodel* upheld SMCRA's constitutionality in its entirety against a Commerce Clause challenge. Defendant asserts that the reclamation fee is an integral component of the comprehensive regulatory program upheld in *Hodel*. Defendant also avers that the reclamation fee itself regulates because it forces the coal industry to internalize a cost it would have preferred to externalize. Further, defendant asserts that the money in the trust fund cannot be dispersed without congressional appropriation. Defendant also avers that a surplus does not exist and significant

funds are still needed to cover the full cost of reclaiming abandoned mines.

The Ninth Circuit set forth the following test for determining when a fee is a tax as opposed to a regulation:

> The test to be applied is to view the objects and purposes of the statute as a whole and if from such examination it is concluded that revenue is the primary purpose and regulation merely incidental, the imposition is a tax and is controlled by the taxing provisions of the Constitution. Conversely, if regulation is the primary purpose of the statute, the mere fact that incidentally revenue is also obtained does not make the imposition a tax, but a sanction imposed for the purpose of making effective the congressional enactment.

Moon, 379 F.2d at 391 (citing *Rodgers v. United States*, 138 F.2d 992, 994 (6th Cir.1943)). In *U.S. Shoe*, however, the Federal Circuit alluded to the statute as a whole, but focused primarily on the HMT. *U.S. Shoe*, 114 F.3d at 1576. In particular, the Federal Circuit explained:

> It is ... beyond dispute that Congress cannot merely impose a direct economic burden on merchandise for export in the absence of regulation. That is the case here. The government has failed to point to any indication that the HMT is intended to regulate commerce. Indeed, it appears

> that the HMT regulates nothing. It is not designed to reduce the overall use of the ports. Rather, the HMT merely increases the cost of exporting by raising money to maintain the harbors ....

Id. (citations omitted). The court, therefore, focuses on the reclamation fee and concludes that *U.S. Shoe* is dispositive of the issue. The reclamation fee, like the HMT, "regulates nothing." *Id.* It does not encourage or discourage any particular activity,[18] and, for that matter, the SMCRA's legislative history expressly indicated an intent to impose the fee "without 'constrain[ing] the development or production' of coal." *Drummond Coal*, 610 F.Supp. at 1499 (quoting H.R. REP. NO. 218, at 136 (1997), reprinted in 1977 U.S.C.C.A.N. 593, 668). The reclamation fee also does not incidentally raise funds.[19] Similar to the HMT in *U.S. Shoe*, the fee was enacted with the purpose of raising revenue to reclaim abandoned mines or inadequately reclaimed mines.[20] To the extent the reclamation fee can be viewed as recouping costs of a regulatory program, the coal producers, the payers of the fee, just as the exporters in *U.S. Shoe*, are not the direct beneficiaries of the service. *Id.* Rather, the coal producers receive a benefit that is no different from that of the general

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[18] Tr. at 64.

[19] *Id.* at 65.

[20] In addition, since 1996, the interest earned on reclamation fees has been transferred to the United Mine Workers of America Combined Benefit Fund to provide health care benefits to coal industry retirees and their dependents. 30 U.S.C. 1231(c)(12); 30 U.S.C. § 1232(h).

public. *United States v. River Coal Co., Inc.*, 748 F.2d 1103, 1106 (6th Cir.1984).

Lastly, in light of *U.S. Shoe*, the court finds defendant's "regulation by internalizing costs argument" unpersuasive. The HMT was directed at exporters who utilized the nation's ports as well as harbors and presumably contributed to their deterioration. According to defendant's reasoning, exporters should have internalized the cost of maintenance and repair. Despite the fact that the HMT would have had the operative effect of requiring exporters to internalize the cost of harbor and port maintenance, the Federal Circuit nevertheless found that it "regulate[d] nothing." *U.S. Shoe*, 114 F.3d at 1576. The court reaches the same result here and concludes that the reclamation fee is indeed a tax.

The parties adopted opposing interpretations of the Federal Circuit's analysis in *U.S. Shoe*. There are several other factors which touch upon the issue and confirm the nature of the Federal Circuit's analysis. As mentioned above, the Federal Circuit specifically opted for the term "HMT." In other sections of the opinion, the Federal Circuit used either "the Comprehensive Water Resources Development Act of 1986 ('the Act')," *id.* at 1566, or "HMT statute." *Id.* at 1577. The Federal Circuit also distinguished in the background section between the HMT and the Act. *Id.* at 1566. Moreover, and perhaps most importantly, the HMT statute in its entirety had indicia of an intent to facilitate commerce. *Id.* at 1578-81 (Mayer, J., dissenting). The Senate Report accompanying the Act also explained that Title 6 and the HMT "affect commercial harbor development and form what is the

single most significant feature of this bill: a modern harbor development policy. Throughout the history of this nation, port and harbor development has been essential to maritime commerce."[21] Accordingly, apart from the Federal Circuit's word choice, these factors give additional credence to the conclusion that the primary focus was on the HMT.

Nevertheless, irrespective of whether the Federal Circuit focused on the HMT or the HMT statute, a determination as to which power Congress was seeking to invoke does not necessarily resolve the issue. The trial court in *U.S. Shoe* succinctly set forth the purpose of an Export Clause inquiry:

> [E]ven if the court were to find the Tax to be a charge imposed under the commerce power, such a charge is still subject to the restrictions of the Export Clause if it in fact serves as a tax or duty. For example, a charge upon exports imposed under the Commerce Clause as a user fee, or to regulate commerce, would not be immune from the restrictions of the Export Clause if the court found the charge actually to be a tax or duty on exports. The court looks to substance over nomenclature.

U.S. Shoe, 907 F.Supp. 408, 19 C.I.T. at 1288.[22] With

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[21] See also S. REP. NO. 99-126, at 7-9 (1986), reprinted in 1986 U.S.C.C.A.N. 6639, 6645-47.

[22] Claire R. Kelly & Daniela Amzel, *Does the Commerce Clause Eclipse the Export Clause?: Making Sense of United*

this admonition in mind, the court cannot overlook the plethora of decisions which have consistently concluded that the reclamation fee, contrary to its title, is actually a tax. *River Coal,* 748 F.2d at 1106 (explaining that the reclamation fee "is an involuntary exaction for a public purpose ... [which] has the essential characteristics of a tax ...."); *Drummond Coal,* 796 F.2d at 505 ("[N]owhere does the [SMCRA] specify what elements comprise a 'taxable' piece of coal.") (quoting 610 F.Supp. at 1497); *United States v. Ringley,* 985 F.2d 185, 187 (4th Cir.1993) ("The [defendants] concede that the reclamation fees at issue in this case are excise taxes ...."); *Tri-No,* 819 F.2d at 158 (noting that "[t]he reclamation fee is simply an assessment or excise tax ...."); *United States v. Devil's Hole, Inc.,* 747 F.2d 895, 898 (3d Cir.1984) (holding that "[t]he funding method adopted in Title IV is a fee or excise tax ...."); *United States v. Fire Ring Fuels, Inc.,* 788 F.Supp. 326, 329 (E.D.Ky.1991) (concluding that a "reclamation fee is a tax" and that "[r]eclamation fees are a form of excise taxes ...."); *Spring Ridge Coal,* 793 F.Supp. at 129.

Defendant's efforts to distinguish the above-cited

States v. United States Shoe Corp., 84 MINN. L. REV. 129, 132 (explaining that their analysis "should be applied to any exaction that falls within the scope of 'tax or duty,' whether enacted under an exercise of the Taxing Power, the Commerce Clause, or both"); Erik A. Jensen, *The Export Clause*, 6 FLA. TAX REV. 1, 45 (agreeing that "a tax or duty on exported articles is forbidden, regardless of whether the levy might otherwise have been within Congress' power to regulate commerce").

cases are unpersuasive. As defendant correctly points out, none of the cases dealt with the reclamation fee in the export context. This argument, however, does not change the underlying conclusion reached in those cases- that the reclamation fee is a tax. Further, the true import of the above-cited cases lies not only in their holdings, but in their context. While defendant attaches significant weight to context as a distinguishing factor, defendant's argument actually strengthens plaintiffs' position rather than weakens it. The Supreme Court has explained that an inquiry under the Export Clause is more strict than an inquiry under other constitutional provisions. In *IBM,* the Supreme Court refused to allow Commerce Clause and Import-Export Clause jurisprudence to govern an Export Clause analysis. *IBM,* 517 U.S. at 850-61. Likewise, in *U.S. Shoe,* the Supreme Court reinforced its holding in *IBM* by refusing to rely on more expansive cases outside the Export Clause context. *U.S. Shoe,* 523 U.S. at 367-68. The most pronounced application of this principle was visible in the Federal Circuit's decision in *Thomson Multimedia Inc. v. United States,* 340 F.3d 1355 (Fed.Cir.2003). In that case, the Federal Circuit held that the HMT, which was deemed a tax for purposes of the Export Clause in *U.S. Shoe,* was a user fee in the context of a Uniformity Clause challenge. Accordingly, the reclamation fee's status as a tax in contexts where the analysis is more lenient, i.e., outside the Export Clause context, mandates that it receive the same treatment for Export Clause purposes.

In sum, *Hodel* did not hold that Title IV of SMCRA was a valid exercise of Congress' Commerce Clause power. The parties proffered two positions

regarding the proper relationship between the Export Clause and the Commerce Clause. Plaintiffs prevail under either theory. Assuming the Export Clause completely overrides the Commerce Clause, the reclamation fee is unconstitutional irrespective of whether it sought to regulate or raise revenue. Conversely, if a Commerce Clause analysis should be undertaken, the reclamation fee is invalid in the context of this lawsuit because the fee itself does not regulate and because the fee repeatedly has been held to be a tax. These conclusions coupled with defendant's concession that the sale of coal occurs in the export process and with the court's previous holding that the reclamation fee is imposed upon the sale of coal and burdens that event, dictate the result that the reclamation fee as applied to exports is unconstitutional and cannot stand.

Conclusion

For the above-stated reasons, plaintiffs' Motion For Summary Judgment is hereby GRANTED. Defendant's renewed motion to dismiss for failure to state a claim upon which relief can be granted is hereby DENIED. A status conference concerning further proceedings in this case will be held on Wednesday, May 11, 2005, at 2:30 p.m. The court will initiate the call.

IT IS SO ORDERED.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2009-5083

CONSOLIDATION COAL COMPANY, CONSOL OF PENNSYLVANIA COAL COMPANY, CONSOL OF KENTUCKY INC., EIGHTY FOUR MINING COMPANY, HELVETIA COAL COMPANY, ISLAND CREEK COAL COMPANY, KENT COAL MINING COMPANY, KEYSTONE COAL MINING CORPORATION, LAUREL RUN MINING COMPANY, MCELROY COAL COMPANY, NINEVAH COAL COMPANY, QUARTO MINING COMPANY, EAGLE ENERGY, INC., ELK RUN COAL COMPANY, INC., GOALS COAL COMPANY, GREEN VALLEY COAL COMPANY, INDEPENDENCE COAL COMPANY, INC., KNOX CREEK COAL CORPORATION, MAR FORK COAL COMPANY, INC., MARTIN COUNTY COAL CORPORATION, PEERLESS EAGLE COAL COMPANY, PERFORMANCE COAL COMPANY, RAWL SALES & PROCESSING, SIDNEY COAL COMPANY, INC., STONE MINING COMPANY, JIM WALTER RESOURCES, INC., EASTERN ASSOCIATED COAL CORP., KINGSTON RESOURCES, INC., PIONEER FUEL CORPORATION, POWDER RIVER COAL COMPANY, APOGEE COAL COMPANY, ARCH WESTERN RESOURCES, LLC, CANYON FUEL COMPANY, LLC, CATENARY COAL COMPANY, COAL-MAC, INC., DAL-TEX COAL CORPORATION, HOBET MINING, INC., MINGO LOGAN COAL CO., PAYNTER BRANCH MINING, INC., PLATEAU

MINING CORPORATION, RAG CUMBERLAND RESOURCES, L.P., RAG EMERALD RESOURCES, L.P., TWENTYMILE COAL COMPANY, COASTAL COAL COMPANY, LLC, COASTAL COAL-WEST VIRGINIA, LLC, EVERGREEN MINING COMPANY, MID-VOL LEASING, INC., MOUNTAINEER COAL DEVELOPMENT COMPANY, OLD BEN COAL COMPANY, SHIPYARD RIVER COAL TERMINAL COMPANY, RIVERSIDE ENERGY, INC., VIRGINIA CREWS COAL COMPANY, CLINTWOOD ELKHORN MINING COMPANY, GATLIFF COAL COMPANY, PREMIER ELKHORN COAL COMPANY, PERRY COUNTY COAL CORPORATION, GLAMORGAN COAL COMPANY, LLC, TERRY EAGLE, L.P., NICHOLAS-CLAY LAND & MINERAL, INC., NICHOLAS-CLAY COMPANY, LLC, ANDALEX RESOURCES, INC., GENWAL RESOURCES, INC., PACIFIC COAST COAL COMPANY, USIBELLI COAL MINE, INC., WEST RIDGE RESOURCES, INC., UNITED STATES STEEL MINING COMPANY, LLC,

and

COVENANT COAL CORPORATION,

Plaintiffs-Appellants,

And

WELLMORE ENERGY COMPANY, LLC

(formerly known as Rapoca Energy Company, LLC),

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims in 01-CV-254 and 01-CV-442, Senior Judge Bohdan A. Futey.

ORDER

NOTE: This order is nonprecedential.

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the Appellants, and the petition for rehearing, having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on October 19, 2010.

FOR THE COURT,

/s/

Jan Horbaly

Clerk

Dated: 10/12/2010

cc: Steven H. Becker; John Y. Merrell, Jr.

Tara K. Hogan

CONSOLIDATION COAL V US, 2009-5083

(CFC - 01-CV-254;01-CV-442)